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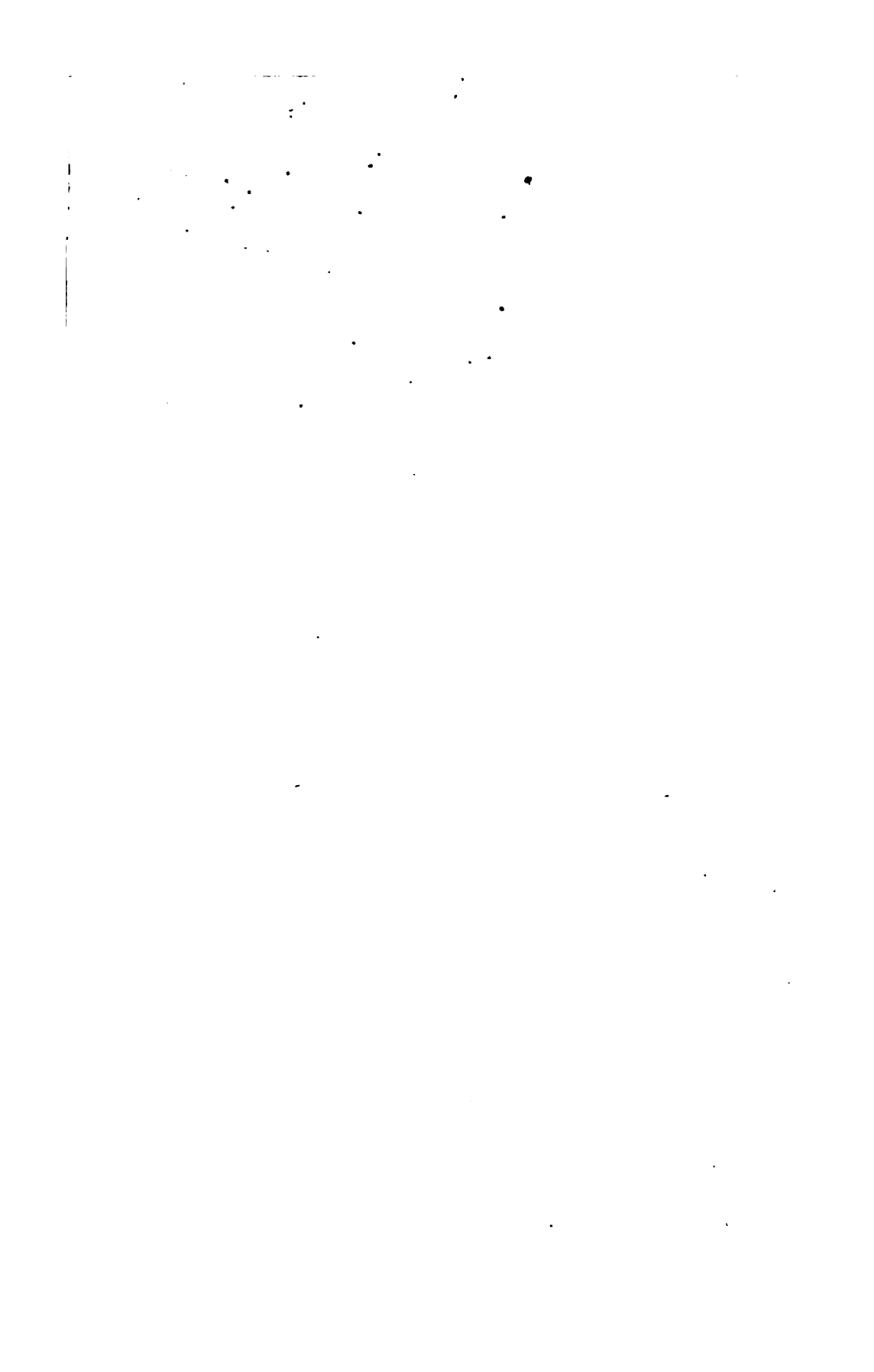
d. Eng. C. 28 e..

Arbitration 23

CW. I. K.

X 585

B 598



A
PRACTICAL TREATISE
ON
THE LAW OF AWARDS
AND
ARBITRATIONS,
WITH
FORMS OF PLEADINGS, SUBMISSIONS, AND AWARDS.

BY SIDNEY BILLING, Esq.

BARRISTER AT LAW.

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P R E F A C E.

THE construction of the 39th and 40th sections of the 3 & 4 Wm. 4, c. 42, so much unsettled the Law of Awards, that it may almost be said to have been within the last few years remodeled, therefore, the Author deemed a treatise upon the subject embracing all the new cases of any interest, would be one welcome to the Profession.

In this Work the design has been to present the law as it is, and *all the cases cited have for that purpose been read.* Those in *Comyn's Digest* have been taken for granted, and when cited have been cited as appearing in *Comyn's Digest*, the text of which Work has been, as far as possible, adopted. And the endeavor has also been to be as brief as the elucidation of the principles which govern the various points would allow, for it was felt something more than a dry detail of points was necessary, in order to the thorough understanding of the matter of the Treatise. Wherever the point decided was deemed to be irreconcilable with the broad principles which govern the subject, the deviation has been noticed and the point argued, not, it is trusted, in a presumptuous and arrogant spirit, but from a sincere desire to search thoroughly into the matter, and when it is recollected that the decisions of some of the most

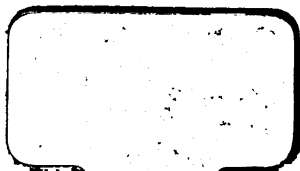
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eminent of our Judges have conflicted, upon the subject of Awards, the Author trusts such recollections will have weight with his professional brethren, and that they will attribute any doubts or arguments they may be met with in the course of the Work to the right motive, at the same time where the presumed error has occurred, the Author has deemed it proper to set forth the cases, for the decisions upon them, until overruled, must be received as law.

The plan of this Work has been to comprise as much matter in as little space as possible, consistent with a thorough and practical elucidation of the subject, and yet so as the Work shall not be a *mere digest*, for the endeavor has been to elicit the principle as well as to present the point decided. To do which it has been found necessary to introduce many notes, and which notes will not be found in any instances to vary, but in all to illustrate the text, being for the most part a digest of the principal case upon the point in question, and wherein has been preserved, as far as was consistent with the design of the Work, the very words of the Judges who have decided them.

The attempt has also been made to class the subject under distinct headings, and to show forth the principle which governs every point, and to avoid what is too generally found to be the case with works of this character, a constant and almost unavoidable repetition of the subject. It was thought by dividing the matter of the work into headings rather than into chapters, this object could be more readily effected, and how far the Author has been successful, it is for the candour of the Profession to judge. Where a point has been

set forth, it was also thought the purposes of practical utility would be more answered by the citation of the case, immediately in point than by the citation of many somewhat analogous cases, though the usual plan, is one, it is conceived, which tends, in practice, to create confusion, and always leads to a great expenditure of time.

The first intention was to introduce a great number of forms, both of Pleadings, and of Awards and Submissions; but, on reflection, that course was abandoned, its effect being to increase the bulk of the Book without adding in a corresponding degree to its utility. But whilst the Author has been careful not unnecessarily to swell out the Book with matter which could be dispensed with, he was equally so that his object should not be accomplished by the sacrifice of anything which could be practically useful, and in order to further the utility of the Work, the Index has been made as copious as possible; for, in common with the rest of the Profession, the Author has often had reason to complain of the scanty reference to the contents of a Work, whilst the space which should have been appropriated to such purposes, has been occupied by statutes which already have a place on the shelves of an ordinary library. In conclusion, the Author trusts his labors will not be considered useless or unnecessary by the Profession generally, and, at the same time begs to thank the several Gentlemen who have afforded him their kind and friendly assistance and whose valuable suggestions have greatly contributed to further the original design of the work and curtail his labor.

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ERRATA.

Page.	Line.	
4	25	for is as follows, read are as follows.
8	19	witness, read witnesses.
10	7	dele which says.
12	7	are allowed, read is allowed.
32	1	it is not, read it was not.
—	18	husband died, read husband die.
35	8	and Best, C. J., read and in another case, Best, C. J.
37	16	their lives, read his life.
52	21	an arbitration read an arbitrator.
62	5	without his consent, read without his (the defendant's) consent.
—	27	where after, read whether after.
65	12	when against, read when the proceedings are against.
—	13	to both for one only, read to both parties if one only.
67	11	arbitrators receive, read received.
73	5	where on a submission, read where in a submission.
86	17	conceded that any, read conceded the words that any.
90	14	be fairly, read may be fairly.
103	11	Court set, read Court will set.
104	23	thereto, read therein.
136	10	Question, read object.
161	10	or other reason, read or any other reason.
167	25	arbitrator award, read awarded.
170	8	suit was, read suit which was.
176	22	first four days, read first four days of the term.
183	10	trial should, read trial the applicant should.
190	6	one person, read one party.
—	7	for exceeding, read fur exceeding.
—	12	the award of the reference in, read the award and that the costs of the reference shall be in.
194	6	had discontinued, read had not discontinued, or, read nor.
198	8	takes costs, read pays costs.
199	3	arbitrator has, read arbitrator had,
—	4	said, read says.
—	5	moiety, read moiety of the costs.
—	23	circumstances read circumstances.
204	16	but which, read agreement.
215	22	award would, read award could.
216	3	post hunc motam, read post hunc motam.
228	20	which doctrine is now overruled, read the practice is now different.
234	16	which has, read which have.
—	31	decided, read made.
235	5	power, read proviso.
242	16	against, read by.

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THE LAW OF AWARDS.

ARBITRATION.

In the early periods of the world, in the infancy of society, Society, formation of. when it first emerged from the primitive state of barbarism, when the idea of a fixed property in the soil and produce assumed a place in the mind of man, it was then by slow General principle and origin of. gradations, the forms and bonds of convention grew, until, by the accumulation of the artificial wants and distinctions of ages, that system was formed which is now termed Society, governed as it is by particular laws and usages.

Law as well as society must have been gradual in its Law, origin of. formation, and have accompanied it in its advance onward in the scale of civilization, for it was only by the aid of law, society could be upheld, protecting on the one hand the possession of the soil, and its produce or property, and repressing, on the other, the attempts to dispossess the occupants, to establish rules for the guidance of the new state, and to punish the violation of the usages thereby established.

It is not difficult to conceive that in the early periods of Law in the early stages of society. society, the most simple rules would be adopted for the guidance and preservation of the interests of the community,

Law in the
early stages of
society.

and it would be more easy to suppose that upon a dispute arising between any of its members, that it should be referred to the decision of their neighbours and friends, than that a perfect system of rules and regulations should have been established, for law cannot have preceded, but must have originated from the necessities of society.

In the state above adverted to, the rules of *mere equity* (a) were all that would be necessary to be observed, but when the ramifications of society became more extended, and the rights of individuals assumed a more complex character, then the simple principle before in use would be found inadequate, and in order to grasp the many and varied interests of the community, general and fixed rules would be adopted; for the object of judication is not, as a general principle, the benefit of individuals, but the good of the community at large. The establishment of these rules to meet the various wants of society, would necessarily have ousted the simple system of adjudication and the tribunal of the magistrate would be established.

Awards pro-
tected by the
Courts.

Though in these days the reference of matters in difference to arbitration has a place, it is not as a principal, but as an auxiliary power, and which is conducted upon a fixed system of rules, and supervised by the Courts of judicature (b), to the consideration of which, as a system, the following pages are dedicated, as it forms a material and important branch of modern law, for it is instituted in

(a) The term mere equity is used as distinguishing the rules of simple justice from the forms and observances of the Courts of law.

(b) The independence of the Courts, in matters of awards, is said to have commenced in the reign of Charles II., while Sir John Kelynge presided in the Court of Queen's Bench, (Coleridge, Bl., note 14, p. 17), this cannot be strictly correct, for there is a case in the Year Books, 16 Ed. 4, 2 pl. 6, relating to a breach of promise of marriage, and others also before the above period.

aid of, and protected by, the Courts of law as by the constitution established, and in furtherance of which, statutes have been enacted to aid the parties removing their causes of dispute from the immediate cognizance of the Courts, and to carry out the intentions and execute a full measure of justice between the parties.

Awards protected by the Courts.

“ Arbitration is where the parties injured and injuring submit all matters in dispute, concerning any personal chattel (*a*) or personal wrong (*b*), to the judgment of one or more persons appointed by agreement between the parties,” whose decision is called an award, and thereby the question is as fully determined and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a Court of justice (*c*). “ The arbitrators are the judges of the parties’ own choosing (*d*), and are not bound by the rules of practice adopted by the Court (*e*).”

Arbitration, what.

Arbitrator, what rules of conduct.

Arbitrations when resorted to on proper occasions, the jurisdiction is of inestimable value (*f*), and Mr. Justice Coleridge says, “ Excellent as trial by jury undoubtedly is as a means of investigating the truth, yet there are cases to which, for various reasons, it is not applicable. Thus when long and complicated accounts are to be examined, it can

Reasons in favour of arbitrations.

(*a*) Mr. J. Blackstone, in his definition, does not include land, which formerly was supposed not to pass by the award, the land does not pass (nor the specific chattel awarded) immediately into the possession of him in whose favour the award is (*infra*), but the arbitrator can direct a conveyance, or release, and in case of the chattel, the delivery or its value can be enforced in various ways.

(*b*) 3 Bl. Com. 16.

(*c*) Ibid.

(*d*) Thompson, C. B., *Campbell v. Tremlow*, 1 Price, 81.

(*e*) There is a material distinction between those rules which are founded upon the immutable principles of justice, and those which depend upon the practice of the Court, by the latter they are not bound, Abbot, C. J. *In re Badger*, 2 B. & Ald. 692.

(*f*) Denman, C. J., *Scott v. Van Sandeau*, 1 Q. B. 109.

Reasons in
favour of arbi-
trations.

hardly be expected that twelve men placed at hazard in the jury box should be able to determine very accurately upon the allowance of particular items, or to strike a nice balance between the contending demands. Again, it will often happen that two persons lay claim to the whole of the same thing as a matter of mere right, which, under proper regulations, might very well suffice for both, and of which it might be ruinous to either to be wholly deprived, as a stream of water, yet in such case the verdict of the jury can only determine to whom the right belongs, it cannot look to the consequences nor make a beneficial division of the use between both. In this way (arbitration) the parties have the benefit of a more deliberate investigation; if the matter be of a scientific nature, or removed from the common information of men, they may select some one to decide it whose habits have made him conversant with it, and by investing him with more or less power, they may have a decision more single and unbending than that of the law, prospective in its operations, and limiting in detail the future exercise of disputed rights." The inconveniences which attended submissions to arbitration in early times, has gradually been removed, partly by the enlarged application of legal principles by the Courts of law, and partly by the interference of the Legislature (a).

The matter of the acts relating to arbitrations are as follows:—

Legislative
enactments,
9 & 10 W. 3,
c. 15, s. 1.

9 & 10 Wm. 3, c. 15, s. 1 (b). From and after 11th

(a) 3 Bl. Com. p. 17, note 14, by Coleridge, J.

(b) Whereas it hath been found by experience, that references made by rule of Court, have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission: now for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final

May, 1696, merchants, traders, and others, submitting any suit in difference to arbitration and agree that such submission shall be made a rule of any of his Majesty's Courts of

Legislative enactments,
9 & 10 W. 3,
c. 15, s. 1.

determination of controversies, referred to them by merchants and traders, or others, concerning matters of account, or trade, or other matters, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in Parliament assembled, and by authority of the same, that from and after the eleventh day of May, which shall be in the year of our Lord one thousand six hundred and ninety-eight, it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, controversies, suits or quarrels (for which there is no other remedy but by personal action or suit in equity) by arbitration, to agree that their submission of the suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond, or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court, and a rule shall thereupon be made by the said Court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission: and in case of disobedience to such arbitration or umpirage the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court, when he is a suitor or defendant in such Court, and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other Court, either of law or equity, unless it shall be made appear on oath to such Court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption, or other undue means.

II. And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means,

Submission, a rule of Court, disobedience thereof, a contempt.

Record, and which agreement being inserted in the submission, &c., may on affidavit of the witnesses be entered of record in such Court. In case of disobedience or neglect to perform, &c., they shall be subject to all the penalties, of contemning a rule of Court and process shall issue accordingly, and which shall not be delayed by prohibition unless it appears on oath that the arbitrators, &c. have misbehaved, and that such award, &c. was procured by corrupt means.

Sect. 2.
Misbehaviour of arbitrator.

Sect. 2. Awards, &c. procured by corruption shall be void, and set aside by the Court wherein the rule was obtained, on application before the last day of the term, succeeding the publication to the parties.

3 & 4 W. 4,
c. 42, s. 39.

3 & 4 Wm. 4, c. 42, s. 39(a). The authority of an arbi-

shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties : anything in this act contained to the contrary notwithstanding.

(a) Sect. 39. And whereas it is expedient to render references to arbitration more effectual ; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of nisi prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge ; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference ; and that the Court or any Judge thereof may from time to time enlarge the term for any such arbitrator making his award.

Sect. 40. And be it further enacted, that when any reference shall

trator or umpire appointed by rule of Court, Judge's order, or order of nisi prius in any action, or in pursuance of a submission containing an agreement to make the same a rule of Court, shall not be revocable without leave of the Court or a Judge, and the arbitrator, &c. may proceed

have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found: provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Sect. 41. And be it further enacted, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

Enlargement of time. notwithstanding such revocation, though the person should not afterwards attend the reference, and the Court may enlarge the time, in which the award is to be made.

Sect. 40.
Attendance of witnesses. Sect. 40. The Court or Judge by rule or order may command the attendance of persons as witnesses to be examined before the arbitrator. The disobedience of such rule or order shall be deemed a contempt, if on service an appointment of a place of meeting, and of the time be made, signed by the arbitrator, &c., such persons (witnesses) to be entitled to conduct money, as on an attendance at a trial. Application for such order, &c. shall set forth the county wherein such witness resides, or satisfy the Court or Judge that such witness cannot be found. No person to be compelled to produce any other documents or writings than he would be at a trial, or to attend for more than two consecutive days to be named in the order.

Sect. 41.
Administration of oath. Sect. 41. Arbitrator, &c. under such submission to be empowered to examine upon oath the witnesses, and on false oath such witness to be subject to all the penalties of perjury.

SUBMISSION TO ARBITRATION.

A submission to arbitration is where two or more persons consent to refer their disagreements and differences to the decision of one, two, or more persons, as they may agree among themselves; the decision of which person or persons is called an award. It may be entered into by deed, or by parol, (*i. e.* by a simple agreement in writing, or orally), but in all cases it must be by the mutual assent of the parties, or those empowered by them (for there is no rule of law which will compel persons, against their wills, to refer their differences to the decision of a private tribunal, which arbitration is).

Submission to arbitration, what.

Entering into the submission.

The assent of the parties may be express, as shewn by entering into the submission, or implied, which latter is evidenced by their conduct, when a departure has been made from the terms of the submission (*a*), as by acquies-

Assent express or implied.

(*a*) The arbitrator had power to enlarge the time by indorsement, which was done, and before it expired, an extension of the time was desired, which plaintiff obtained by a Judge's order, and was made a rule of Court, and served upon the arbitrator, who appointed a time for hearing the matters, the defendant's attorney attended, but the plaintiff's attorney did not, on the ground of the absence of a material witness, the arbitrator made his award without any further indorsement; held as sufficiently formal, and consent would be presumed by the plaintiff procuring the order, and the defendant attending the meeting. (*Leggett v. Finlay*, 6 Bing. 257, Tindal, C. J.).

Where the reference was by a Judge's order, and the time was to be enlarged by indorsement, but which expired without the indorsement being made, and no application was made by either party for an enlargement; after the expiration of the time, the defendant's attorney said to the plaintiff's attorney, "the time has expired," who answered, "very well, I suppose the time can be enlarged by a Judge's order," and they attended the meeting; afterwards, when the arbitrator was

Assent express or implied. cence in an award for a long period of time (*a*), or by consenting to be examined as a witness by the arbitrator (*b*), so signing an agreement directed to be entered into by an arbitrator, is evidence of a submission; for, doing the thing directed to be done by him, is a recognition of his authority (*c*).

Award without order of reference, parol agreement. There is a dictum of Mr. Baron Parke's which says that the award of an arbitrator might be good without an order of reference, and when the time allowed by the order of reference had expired, there was nothing to prevent both parties agreeing to allow the arbitrator to act until the

about to make his award, the plaintiff's attorney objected that the time had expired, and that the arbitrator's authority was at an end. The Court on application enlarged the time. (*Parbury v. Newham*, 7 M. & W. 382).

"The time passed for making award without enlargement according to the power, at a meeting the arbitrator expressed an opinion that the time should be enlarged, the attorneys of both the parties went on with the submission, which affords a good evidence of a new submission by parol." (*Hallet v. Hallet*, 5 M. & W. 27, Parke, B.). The Court intimating its concurrence is unnecessary, it was a good enlargement. (*Ibid.* 28, Alderson, B.).

(*a*) *Jones v. Bennett*, 1 Bro. P. C. 520. Award of a certain sum which was paid, and general releases which were exchanged, after an acquiescence for nine years, a bill was filed on the ground that there were only particular things submitted, and for an account of all other things excepting them, on hearing the Lord Chancellor said, "I see no reason for disturbing the award, or re-examining matters so solemnly determined." The bill was discharged, and an appeal was made against the decision, which was dismissed, and the decree confirmed.

(*b*) *Matson and Another v. Trower and Another*, 1 Ry. & Mood. 18, the parties recognised the authority of the arbitrator by submitting to be examined. (*Abbott, C. J.*, 18).

(*c*) An objection to an award was, that there was no evidence of a submission, *Tindal, C. J.* held that the signature to a memorandum of agreement directed by the arbitrator to be given, was a sufficient recognition of their authority. (*Smart v. Nicholson*, 3 Bing. N. S. 121).

award was made (a). And, upon this principle, it will be seen by consulting the notes (b) the Courts usually act.

The cases in which this allowance of the Courts has been rendered particularly necessary, are those in which the time originally allowed has been suffered to run out through the laches of the arbitrator, in not acting in accordance with the submission. Principle, reason of.

By the provision of the statute of William 4, (c) the Courts have power to enlarge the time for making the award of those submissions which fall under their authority, still, as there are cases in which, through neglecting to make the proper provision in the submission, the Courts (d) have not power to interfere, then the old law has force, and, in such cases, the rules of the common law apply (e). Power to enlarge time for making the award.
Parol submission.

In those cases where the time originally allowed by the submission has run out, or has not been kept alive, according to the terms of the submission (the time not having been enlarged in accordance with the power contained in the statute of William 4,) and the Court has, from the conduct of the parties, presumed their acquiescences in the continuation of the authority of the arbitrator, the submissions Lapse by laches of arbitrator.

(a) *Benwell and Another v. Hinxman and Another*, 3 D. P. C. 501.

(b) *Supra*, p. 9 and 10, in *notis*.

(c) *Et vide infra* (*Enlargement of Time*), where the power of the Court to enlarge the time is fully discussed, it is said the Court has power to enlarge the time under the provisions of the statute of the 3 & 4 Wm. 4, c. 42, s. 39, because there are several decisions to that effect, and whilst they exist they are of course declaratory of the law.

(d) Omitting the clause directing the submission to be made a rule of Court.

(e) The parties may revoke the submission at any time before making the award, and the Courts cannot interfere, but if the submission be by deed (which is in such cases the usual mode) conditioned in a penalty, an action may be had thereon for the nonperformance of the award, (*vide infra*, and pleading).

Lapse by
laches of arbi-
trator.

Parol submis-
sion on lapse.

Power given
by statute.

Submission to
be made a rule
of Court.

only survive by the parol agreement of the parties, and which is an extension of, and is amalgamated with the written submission; for, if there be no amalgamation of the parol with the written submission, the Court could have no power over it. The parol submission proceeds strictly in accordance with the terms of the prior submission, and the examination of the witnesses, &c., are allowed, as though the original submission was never extended, and does not affect any matter in difference, and is a benefit to both the parties, in saving them expense, and furthering the settlement of the matters in dispute, in accordance with their own views. If there be no amalgamation, then the award must stand upon the parol submission, and, if it so stands, it is doubtful whether the Courts have any power over it, (they could derive no power under the statute, for the arbitrator has expended his authority by making the award, and, it is presumed, the authority given by the statute would not be extended so as to continue, or rather revive, a power which has, by being exercised, ceased to exist)(a). In a case where (the agreement was said to have been extended by parol) the submission contained a power to make it a rule of Court, Lord Eldon said either might recede until it was so made, for "the word insert, in the statute, must mean an act that infused that submission into something written," and that he always understood that where an award is to be made a rule of Court, the submission that it shall be so must be in writing (b). By which words it would appear that

(a) *Infra*, title *Award*.

(b) ——— *v. Mills*, 17 Ves. 419, *et seq.*

This case was one where a something was introduced into the award extrinsic of the submission, the reference was of the cause, and the agreement alleged was, that matters in difference were to be included, and of which the award was made, the application was to prevent by injunction the award being made a rule of Court in consonance with the submission.

evidently his lordship doubted whether a parol submission could be made a rule of Court, and though, in this case, the oral submission was intended to vary the written one. It is apprehended there is no difference in principle from that above. In cases where the parol submission is in aid of the written one, the Courts always allow them to take effect, and therefore it may be said that the acquiescence of the parties incorporates the new agreement with the substance of the former written one, and "amounts to a new agreement by parol to abide by the award" (a).

Submission to be made a rule of Court.

Parol submission in aid of written one.

Where it is attempted by an oral submission to vary the terms of a written one, it is presumed that rule of law would apply, which says that an agreement in writing cannot be varied by an agreement by parol (oral), though we shall find that a written agreement not under seal was allowed to vary the defeasance of a submission which was under seal, perhaps because the intention of the parties was sufficiently expressed by being reduced into writing, (b) and that the continuation of the power of the arbitrator was for the advantage of both, but which reasoning could not apply to a matter not so ascertained, and also the observations of Lord Eldon would exactly apply, and were made in a case where it was attempted to introduce new matter for the consideration of the arbitrator, besides the award when made would not be in accordance with the submission, and might be bad for the excess, unless it was capable of severance (c).

Parol agreement varying written submission.

Written agreement, varying defeasance of a submission by deed.

Written agreement, variance by parol, not in accordance with the submission.

As a general rule, it may be said, an award made in accordance with a parol submission is binding upon both parties, and suit may be had thereon.

Parol submission, general rule.

In referring a cause, care should be taken that neither

Terms of the submission.

(a) *Cooper v. Langden*, 9 M. & W. 60.

(b) *Greig v. Talbot*, *infra*. (c) *Infra*, *Severance of Matter of Award*.

Terms of the submission.

Reference of cause only.

Of cause and all matters in difference.

more nor less is inserted in the submission than the parties intend to refer, for the submission is the instrument whereby the arbitrator ascertains their intentions, and by which in the examination of after disputes the Court is guided (a). If there be a cause pending, and it is intended the cause only should be referred, the submission should be *of all matters in difference in the cause between the parties*, for thereby the cause only is referred, but by a slight alteration in the arrangement of the words *as all matters in difference between the parties in the cause*, every matter in difference between the parties is referred, and therefore it is of the *greatest consequence that the particular words used should be noticed*, for it might be there were other matters in difference which it would be of the greatest moment not to submit, but which, perhaps, accidentally might be included through a *hasty reading* of the words of the submission.

(a) *Harries v. Thomas*, 2 M. & W. 32. The action was for compensation from an attorney for bad advice and negligence, &c., the order of reference directed that the arbitrator was to state all matters in difference between the parties, touching defendant's bills of costs, with power to have them taxed, &c. &c., but no question of liability was to be raised. Before taxation it was discovered that the defendant had not been admitted into the superior Courts at Westminster, until a greater part of the business was done for which the charge was made; before the Master it was contended so much should be struck out; he considered this to be the province of the arbitrator, but wrote in the margin of the bill that he considered such charges should not be allowed; the award stated the arbitrator had heard evidence as to when the defendant was admitted, and awarded the plaintiff to pay 170*l.*, and directed the defendant to give up the plaintiff's papers on demand. On motion to set aside the award, it was contended such a result could not have been arrived at unless the charges previously to the admission had been disallowed. *Contrà*, no question of liability, &c. was merely introduced to guard against the counts for negligence, &c. (35). The Court directed the rule should be made absolute, unless the plaintiff agreed to go before the arbitrator again, to ascertain the value of the whole accounts, (35).

When the reference is of a cause at Nisi Prius, care should be had that the verdict is taken for the full amount of the damages laid in the declaration, for the arbitrator has no power to award a larger sum as damages in a cause than that for which the verdict is taken, although there be a reference of matters in difference along with the cause (a). Verdict at nisi prius.

When an agreement is to refer disputes existing, as well as those in anticipation, a clause should always be inserted, authorizing either of the parties to make the submission a rule of Court; for without it, the Court cannot interfere in a summary way, or command the attendance of witnesses before the arbitrators, and the only remedy would be by an action upon the award; nor has the Court power to prevent a revocation of the authority of the arbitrators before the award is made, but if it be once made, neither party can revoke. To make the submission a rule of it.

So power should be given to the arbitrator to enlarge the time, (though the Court can now in its discretion do so (b)), To enlarge the time.

(a) *Bonner v. Charlton*, 5 East, 143, was a reference of a cause and all matters in difference: a verdict for 30*l.* subject to a reference was taken at the trial at nisi prius by consent: the arbitrator found 70*l.* was due to the plaintiff. Lord Ellenborough, C. J. said, "The verdict taken at the trial was for 30*l.*, subject to the award of an arbitrator, he had therefore a jurisdiction limited within that amount. The damages found by a jury are as the damages laid in the declaration, and operate as a limit to the decision of either. If the jury finds more damages than are laid, and the plaintiff does not remit the excess upon the record, the Court cannot, and the verdict will be erroneous; we cannot reduce a verdict, we may quash, but cannot mend it. If instead of bringing on the question in this shape (which was to reduce the verdict) the facts had been laid before the Court by affidavits in a summary way, we might have formed our judgment, and aided the plaintiff as far as we could."

"I cannot think under the rule of reference, the verdict having been taken for 30*l.* only, that the law will raise an implied assumpsit for 70*l.* The true meaning of a reference is, that the arbitrator shall mould the verdict which has been taken, and then it shall be taken to be the verdict the jury should have found; in these cases the verdict is generally taken for the amount laid in the declaration." *Le Blanc, J.*, 143. *Infra*, *Award and Necessaries*.

(b) *Supra*, p. 11.

To enlarge the time. and to submit any matter of law for the opinion of the Court (a), and also to enable the Court to send back the matters, or any of them, for the reconsideration of the arbitrator. In the case of *Nickalls v. Warren*, the submission contained a clause empowering the Court "to refer back to the arbitrator matters originally referred," Lord Denman, C. J., said, "if the words 'or any of them' had been inserted, it would have been a proper limitation of the general reference back, for probably the Court would have raised a distinct issue for the consideration of the arbitrator." He also said under such a clause (the clause as it was) it was doubtful whether the Court could send the matter back a second time to be reheard (b). So a provision should be inserted, that if either of the parties die before the award is made, such death shall not act as a revocation of the submission, because as death would abate the action, it necessarily follows it would a reference, which is but the decision of the matter of the action by a tribunal selected by the parties (c). So also there should be a provision for costs, distinguishing between the costs of the reference and the costs of the cause; the rule being that the costs of the reference are always to be borne equally by the parties, unless the submission gives the arbitrator power over them; and the costs of the cause are in the discretion of the arbitrator, but if the award gives no direction respecting them, then they abide the event (d). So it should be expressed in the submission, that the reference of the cause is to act as a stay of the proceedings, otherwise the action might be continued; if introduced, and the cause be proceeded with, the Court or a Judge will order the proceedings to be stayed.

Reference back to arbitrator.

Death of party.

Costs.

Stay of proceedings.

(a) *Infra*.

(b) Under the clause the Court sent the matter back to the arbitrator, and he refused the additional evidence which was offered, the Court held, he could under the clause have reheard the whole matter, and that it entitled the parties to produce additional evidence. (9 Jurist, 10).

(c) *Supra*, p. 9.

(d) *Infra*, p. 188.

MATTERS SUBMITTED AND EFFECT OF SUBMISSION.

By a submission of all actions and complaints—causes of action are submitted. Of all actions and complaints.
 Of all demands—title to land is sub- Of all demands.
 mitted. Of all debts—specialties and judgments, for they
 may be released. Of all differences—all demands may be All differences, and demands.
 released, and it extends to a demand as executor, whether
 in his own right or in that of his wife. Of all actions— Of all actions.
 causes of actions are not submitted. Of actions personal,
 suits, and complaints—actions real are not submitted,
 for personal refers to the whole—but of actions personal Actions, personal suits, &c.
sectis ac querelis—title to land is submitted (a).

When the reference is of all matters in dispute between the parties in the cause, or if there be no cause of all matters in difference, &c., the arbitrator is bound to decide upon all All matters between the parties.
 matters, whether of law or fact, whereof he hath notice, but whether he is bound to do so in express terms is a question (b), and that though the parties of themselves withdraw from his consideration certain items (c).

(a) Com. Dig. Arb. (D. 4).

(b) Where the arbitrator commences his award by stating he has heard all proofs, &c. touching the matters in difference, and made his award of and concerning the same, such was held to be conclusive evidence thereof. (*Dunn v. Warlters*, 9 M. & W. 293, Alderson, B.

“The arbitrator has taken into his consideration all matters submitted, and has awarded upon all,” Tindal, C. J.; “if it had been stated in the affidavit that there were other matters in difference, it might have been grounds for the rule, but the arbitrator’s allegation of hearing all the matters in difference, &c., sufficiently shows no other question was brought before him,” Gaselee, J. (*Day v. Bourrin*, 3 Bing. N. S. 219).

(c) When cross demands are submitted (the reference being of all

All matters
between the
parties.

Demurrer
excepted by
assent of the
parties.

In *Cooper v. Langden (a)*, wherein there was a demurrer to one of the pleas, which Parke, B., said the arbitrator should have disposed of, "but as the parties in effect agreed he should not, it amounts to a new agreement by parol to abide by the award." This appears to be a departure from the principle above laid down, for demurrer is a matter on record, and the arbitrator would necessarily have notice of it. Being an issue in law, and not of fact, may possibly account for the difference, for in the former case the matter is peculiarly within the cognizance of the judges, and hence the Courts, by the assent of the parties, may allow it to be severed from the matters of fact submitted; if it had been excepted in the submission, the arbitrator clearly could have no power; besides, if the matters in fact be decided, leaving but the issue in law, it can scarcely be said to be a continuation of the matters in difference so as to vitiate the decision of the arbitrator (b).

Arrears of
annuity.

Annuity, and
arrears of.

Where an action is brought for the arrears of an annuity which are due, and the action is referred, it will not give the arbitrator power to fix the value of the annuity (c), but where the agreement is to pay an annuity, and to give

matters in difference) the arbitrators should consider them, "there would be no end of disputes if the practice were to prevail, that on a meeting one party gave up item 1, and the other item 2 of his demand, and there were laid out of the consideration in making the award," (*Robson and Another v. Railston*, 1 B. & Ad. 728, Tenterden, C. J.). As this claim has been once presented before the arbitrators, I think it a matter in difference. *Littledale, J., ib. (Vide Dun v. Murray, infra, p. 19).*

(a) *Supra*, p. 13.

(b) *Vide infra*, p. 19.

(c) Two actions were commenced, one for the non-payment of money due on a bond, the other for arrears of an annuity which were secured by a cognovit, the arbitrator took no notice of the annuity as a matter in difference, nor was it mentioned except by the defendant's

ample security to satisfaction, &c., and the declaration alleges non-payment and not giving security, it seems within the arbitrator's power to value the annuity (a). Annuity, and arrears of.

If there be an issue in law (a demurrer to one of the pleas) the arbitrator must dispose thereof (b). Demurrer.

A party must produce all causes in difference, if he does not, and they were in existence at the time of his entering into the submission, he is concluded by the award (c). Matters existing at the time of the submission.

attorney complaining of its terms. The arbitrators awarded a sum to be paid, and that mutual releases should be given between the parties of all manner of action, and actions, cause, and causes, costs, debts, and penalties, &c. &c., the money was paid, and the releases as directed were executed, the annuity remaining in arrear, judgment on the cognovit was entered up, on which it was contended the matter was concluded by the award. Held, not, for the giving the cognovit precluded the supposition of the annuity being included. If the intention of the arbitrators was in awarding releases, though in such general terms that it should enure only to the particular matters referred, the general release did not refer to the annuity bond, and did not include it, though the words are sufficiently large. (*Upton v. Upton*, 1 D. P. C. 406).

(a) *Taylor v. Shuttleworth*, 6 Bing. N. C. 283-4, *Tindal*, C. J.

(b) Issue was taken on all the pleas but one, and to that there was a demurrer, pending the hearing of the demurrer, the cause was referred, and all matters in difference, the arbitrator disposed of the cause and of the demurrer. Held he had a right to do so. (*Mathew v. Davis, Administratrix*, 1 D. P. C., N. S. 679, *et vide supra*).

(c) An arbitration was entered into, and an award made; afterwards another action was brought, which was referred, and the arbitrator stated in a case for Court the former award, which was a compensation for services, and this action was for the dismissal of the plaintiff; the Court held, when all matters in difference are referred, every matter included within the scope of the reference should be produced. If he intended to insist upon this matter, it should have been produced before the prior arbitrator, he cannot now make it the subject of a fresh action. (*Dunn v. Murray*, 9 B. & C. 780. *Smith v. Johnson*, 15 East, S. P.).

Sale of premises before entering into the submission.

Matters occurring after submission.

Decided by former award.

A submission to arbitration refers only to such matters as are in *esse* at the entering thereinto. As where lands (premises) were mentioned in the submission, and sold before entering thereinto, they must be considered as not being therein (*a*), nor any matters occurring after entering into the submission, for the arbitrator can have no authority over a matter which was not in the contemplation of the parties at the time of entering into the submission (*b*). Nor of any matter decided by a former award (*c*).

Where a statute authorized a company to do certain things, and if they do others, an action is directed to be brought within a certain time, but which was brought after the time limited; on reference of the action, the arbitrator found the acts done, but drew a wrong inference therefrom, the Court avoided the award (*d*).

Award good on the face.

Affidavit to explain intention.

When the award is good upon the face of it, the Court will not interfere with the structure of it (*e*), nor will they admit the affidavit of one of the arbitrators to explain their intentions (*f*), nor will they look into affidavits for the

(*a*) *Re Smith & Reeves*, 5 D. P. C. 513.

(*b*) *Golightly v. Jellicoe*, 4 T. R. 147, *in notis*, Ld. Mansfield, C. J.

(*c*) *Trimingham v. Trimingham*, 4 Nev. & M. 786. An award directed the payment of 723*l.* 6*s.* to the plaintiff by defendant, and general releases, part of the money being unpaid, and another sum due, this action was brought, and all matters in difference were referred to one of the former arbitrators, who entered into a claim subsisting, and which had existed at the time of the former submission and award, partly in respect thereof; on application to set aside the award on the ground that the arbitrator had gone into a matter decided upon by the former award, on the arbitrator answering he had not entered into any matter which was decided before, and the other arbitrator to the former submission confirmed it, the Court held the award was good, 787.

(*d*) *Gaby and Another v. The Wilts and Berks Canal Company*, 3 M. & S. 580.

(*e*) *Hall v. Alderson and Another*, 2 Bing. 478.

(*f*) *Gordon v. Mitchell*, 3 Moore, 243.

purpose of upholding an award bad upon the face of it (a); ^{Award bad on face.} but where there was a doubt what was the intention of the parties, there being some little ambiguity in the phraseology of the submission, and the affidavits were contrary as to the meaning of the parties, the Court admitted them, though some were dated before the judgment entered up on the award, and some after. Parke, B., saying, "May not a person make application to the Court *quia timet*" (b).

Where an arbitrator finds the plaintiff had no cause of ^{Finding of arbitrator, pay ment into Court.} action, excepting 10*l.* lent by him to the wife of the defendant when single, but which had been brought into Court, and the Master treated the award as in favour of the defendant, and taxed the costs for him, the Court held ^{Costs.} therewith (c).

Where the arbitrator directed an assignment to be made ^{Assignment according to law.} according to law to A., on request, an assignment to A.'s administrators, executors, and assigns was tendered, it being contended that an assignment according to law, virtually included executors, administrators, and assigns, the question was not decided, but on the argument, Lord Ellenborough, C. J., said a personal assignment to A. might be meant (d).

(a) *Marshall and Others v. Dresser*, 3 Q. B. 882.

(b) The facts were as follows: the defendant agreed to give a cognovit for such a sum as should be found due by the arbitrator. "The costs were to abide the event, and to be paid by the party or parties, and at such time as directed by the arbitrator," who awarded a sum as due to the plaintiff, and divided the costs between the plaintiff and the defendant. The plaintiff signed judgment for the sum awarded, and the costs of the action after the defendant had tendered him the sum awarded, the question was, whether the arbitrator had power to divide the costs, or whether as the event was in favour of the plaintiff he was not entitled to them. The question by direction of the Court was agreed to be referred to the Master to ascertain the intention of the parties. (*Read v. Massey*, 4 D. P. C. 681).

(c) *Dawson v. Garrett*, 2 D. P. C. 624.

(d) *Russell v. Headingham*, 1 Starkie, 13.

Direction in
the alternative.

Time for
making award
not mentioned
in the submis-
sion.

Agreement
contained in a
deed to refer
differences.

Crime not
matters of
reference

Indictment for
riot and assault.

When two matters are awarded in the disjunctive, one of which is impossible or uncertain, that must be taken which can be performed, as where the direction is to pay money within a week or give security, the true meaning is that it shall be paid within the week (*a*). Where no particular time is named in the submission for the decision of the arbitrator, the parties should request him to proceed, for unless that is done, the Court will not resort to the implication that the award should be made within a reasonable time, for they might have revoked (*b*). This decision was before the statute of the 3 & 4 Wm. 4, and it is presumed it would be the ground for an application to a Judge or the Court under the act.

A mere agreement contained in a partnership deed (*c*), or other writing as a policy of assurance, will not oust the jurisdiction of the Courts (*d*).

“As arbitrators have no power but that which the parties can give them, it follows that submission to arbitration cannot be had of such causes as the laws and good manners do not suffer to be exposed to any other event but that which the natural authority of justice gives them, such crimes, therefore, as murder, robbery, sacrilege, adultery, forgery, &c., cannot be brought before other judges than those who are clothed with public authority, for the public advantage” (*e*) demands a public example, besides the honour of the accused can only be purged and his innocence be made manifest in public.

This principle was recognised in the case of *Rant v. Combs*, in which were cross indictments for riot and assault,

(*a*) Lord Mansfield, C. J. *Simmons v. Swaine*, 1 Taunt. 554.

(*b*) *Curtis v. Potts*, 3 M. & S. 145.

(*c*) *Vide infra*, *Awards and Necessaries to*.

(*d*) *Goldstone v. Osborne and Others*, 2 Car. & P. 551, Best, C. J.

(*e*) Kyd on Awards, 63.

which were referred by deed, it contained a proviso to be made a rule of Court; On motion to set aside the award, when the Court understood the reference was by deed, much surprise was expressed, and it was said, "in prosecutions of this kind before verdict, or after verdict, and before sentence, it was usual to allow the persons to talk together by the recommendation of the Court, and, if they agreed, the Court set a nominal fine; but the whole was done under the inspection of the Court, and sentence followed" (a).

Indictment for riot and assault.

In the case of the King on the prosecution of *Stephen Philips v. Lord Falkland and Others* (b), which were three indictments for perjury, and one for conspiracy, on a proposition from the Bar, the indictments were allowed to be referred; but, in this case, it may be presumed to have been by the sanction of the Court, in the prior case it does not appear that the Court had any cognizance of the matter beyond the indictment being found, and, from what appears, it would seem that the parties did not appear upon the indictment being called on; the latter case seems to carry the reference of criminal matters to the furthest verge, and it is doubtful how far the prayer of the submission that it should be made a rule of Court would now be supported, criminal matters not being within the statutes relating to awards.

Perjury and conspiracy.

Conspiracies and perjuries are matters in the prosecution of which the public interest is materially concerned; if this case is to be taken in its nakedness, it may be well said that such matters of crime may be referred. It is apprehended that there were other circumstances than those appearing in the report, either that the prisoners were acquitted of the criminal charge, or that there was an insufficiency of proof, and the Court being anxious to further the rights of the party aggrieved, sanctioned, on proposition, the reference.

Crimes matters of public interest.

(a) Kyd on Awards, 65.

(b) Ib. 67.

Indictable
offences, how
referred.

Indictments
which may be
submitted.

Cases within
the statute.

Indictment
referred, award
under.

In the case of *Beechey v. Wingfield* (a), Gibbs, C. J., is reported to have said, in a case where assault and other matters were referred, that the parties had a right to refer such matters, and which dictum was followed in the latter case of *Baker v. Townsend* (b), but was in a subsequent case contradicted, the Court thought such a reference (which was of all matters in difference) could not comprehend the subject matter of an indictment, and that the words in the statute of William 3, c. 10, had relation only to civil disputes between the parties (c), and which is corroborated by a much later case in the Queen's Bench, which was an indictment for a conspiracy for interrupting two persons in carrying on their trade; the indictment was removed by certiorari into the Court of Queen's Bench, and was at the trial referred. The arbitrators had power to determine what was to be done between the parties; after an ineffectual attempt amongst themselves to settle the matter, the defendants revoked their submission, and a rule was obtained to shew cause why the arbitrator should not be restrained from proceeding with the award, which was discharged on the ground "that such a case of revocation was not within the statute of 3 and 4 of Wm. 4, c. 42, s. 49, which applies to two distinct cases; first, where the parties consent to a rule of Court, Judges' order, or order of nisi prius, in any action; secondly, where there is a submission containing an agreement for making it a rule of Court," and that this case did not fall within either description, and that the agreement contained in the order of reference was not such an agreement within the meaning of the statute (d).

It would seem that when the award is made that the

(a) 11 East, 46.

(b) 7 Taunt. 422.

(c) *Watson v. M'Cullum*, 8 T. R. 520.

(d) *Rex v. Bardell and Others*, 5 Ad. & E. 622, order of reference contained an agreement that it should be made a rule of Court.

Court have power to enforce it summarily, as where an indictment for a nuisance was referred, the verdict was for the Crown by consent, subject to a reference, and the arbitrator found the nuisance, and directed it to be discontinued, which remaining unabated, the Attorney-General moved for judgment on affidavits, the Court held in such a case the prosecutor might proceed for attachment, or for judgment (*a*). In *Rex v. Harding* (*b*), it was said by the Court that though a Judge at nisi prius might, with the consent of the parties, make a rule to refer a cause, the sessions could not do so, even by consent. The Justices Quarter Sessions. may refer a matter to another to examine and make a report for their determination, but the referee cannot finally decide it (*c*).

As a general rule, it may be said that all indictments, the subject matter of which might have been the foundation of a civil action, may, with the assent of the Court, be referred to arbitration, but which references not being of matters within the statutes (*d*), for effectuating the intentions of the parties referring their disputes, are at common law. When indictments are referred, they should be made rules of Court.

When appeal is made against a poor-rate the Justices Appeal against a poor-rate.

(*a*) *Regina v. Gore*, 8 D. P. C. 102.

(*b*) *Salk.* 477.

(*c*) Where an indictment was for the non-repair of a road, to which the defendants pleaded guilty, subject to an award, on application to set it aside, the Court said, "We have no authority over the order of a Court of Oyer and Terminer and Gaol Delivery. If defendants are aggrieved by any thing done by the arbitrators, application for redress must be in the Court below, if a matter of civil right, it must come before us in a shape in which we can interfere, unless the case is within the statute of Wm. 3, we have no jurisdiction. (*Rex v. The Inhabitants of Colesbatch*, 2 D. & R. 265).

(*d*) 9 & 10 Wm. 3, c. 10; 2 & 3 Wm. 4, c. 42.

Appeal against a poor-rate. at sessions, with the consent of the party, may refer the matter to the investigation of another person, and adopt his decision; the assent of the party is necessary, because, without it, the Justices have no power to delegate their authority (a).

Validity of a poor-rate, submission by the parties. The validity of a poor-rate cannot by the parties be submitted to arbitration, which judgment was affirmed in error. Lord Denman, C. J., said, "the arbitrators have been empowered to do what was not lawful—we think this was no binding agreement, and there was no right of action against the defendants,"—and his Lordship also said, "we are by no means of opinion that such an arrangement as this may not be binding if properly entered into" (b).

(a) *Rex v. The Justices of Northampton*, Caldecot, 90.

(b) *Thorpe v. Cole & Others*, 4 Dowl. P. C. 457, in error, 1 M. & W. 531. In this case the validity of a poor-rate had been submitted to arbitration.

WHO MAY SUBMIT TO ARBITRATION.

A submission to an award is an act in the discretion of the parties, therefore every one capable of making a disposition, or a release of his rights, may make a submission to arbitration (a). So also it follows that any one under disability, as a general rule, cannot submit to arbitration.

It is laid down that a *femme covert* cannot be a party to a submission to arbitration (b), but to which rule there are, it would seem, several exceptions: as where a married woman was litigating with her husband for a divorce and alimony: (c) also where a wife has a general power of disposing of property settled to her sole and separate use (d).

(a) Com. Dig. tit. Arb. (D. 2.)

(b) Com. Dig. tit. Arb. D. 2; Roll. Abr. Award, C.; Watson on Awards, p. 56; Kyd on Awards, p. 35.

(c) It was objected that the wife could not agree to the submission so as to bind herself, unless she had been separated from her husband, and that her next friend was not made a party to the submission, held, that the award was founded on an agreement on both sides, and as the husband had filed a cross bill against the wife, which she had answered; under the circumstances she might be considered a *femme sole*, and there was no occasion to make the next friend a party, as there was nothing for him to consent to. Lord Redesdale; confirmed by Lord Eldon, on appeal. (*Bateman v. The Countess of Ross*, 1 Dow. 244).

Where there was a deed of separation, and an after disagreement and a suit in the Ecclesiastical Court, it was agreed to prevent further contests, that all disputes should be referred, and an agreement to make the submission a rule of Court was inserted therein, and it was held such submission might be made a rule of Court. (*Soilleux v. Herbst*, 2 B. & P. 444). In this case the defendant was the trustee of the wife.

(d) *Hulme v. Tennant*, 1 Bro. Cha. Rep. 16. The husband and wife had entered into a joint bond, she having separate property, and the suit was to recover the amount out of the wife's separate property, the Lord Chancellor, after recognising the principle, that a *femme covert*

Husband
civilly dead.

The wife of a man civilly dead is, for the purposes of suit, &c., considered as a *femme sole*, and would, it is conceived, be enabled to submit to arbitration any matter arising out of her contract, or in which she was interested (a).

Sole trader by
custom of
London.

By the custom in London a wife may be a sole trader, and as such may be subjected to a fiat in bankruptcy (b); she can sue and be sued, but her husband must be joined for the sake of conformity, but execution is against her alone, the action upon the custom is brought in the Courts of the City of London, and will not lie in the Courts of Westminster Hall, though it may, in some instances, be pleaded in bar there, as where the suit is against the husband (c), and though she is liable upon simple contract debts she cannot give a bond (c).

acting in regard to her separate property, is competent in all respects to act as a *femme sole* went on to say, "that if a married woman had by instrument contracted that a portion of her separate estate should be disposed of, that she and her trustees might be decreed to make that disposition, but if she enters into an engagement which would make a *femme sole* liable to the whole extent of the contract as to her person, such engagement by a *femme coverte* would not bind her as such; but the cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that the trustees shall be obliged to apply personal property, and rents and profits when they arise to the satisfaction of the engagement," and the Lord Chancellor concluded by saying, "I believe there is no instance of a personal decree against a *femme coverte*, the decree is to fetch forth her separate estate, and make it liable to her engagements."

(a) In one case where the submission was by the husband and wife, but under very peculiar circumstances, the award was made, payable to the wife; payment to the husband was held no payment to the wife, and Tindal, C. J., said, "The question is hardly a point of law, it must be decided according to the equitable jurisdiction of the Court, the intention of the proceedings was the wife should reap the fruits of the proceedings." (*Wynne v. Wynne and Wife*, 1 D. P. C. 723, Tindal, C. J.)

(b) Com. Dig. tit. London, (N. 6.)

(c) Beard and Wife *p.* Webb, 2 B. & P. 103, *et seq.* Eldon, C. J.

As the *femme coverte* trader, by custom of London, is liable to a fiat in bankruptcy, and also to have an execution issued against her, she would also, it is presumed, be liable to perform a submission to an arbitration arising out of her trading contracts, unless such submission was by bond (a). A submission by writing not under seal would, it is conceived, be binding (or an oral submission after award made), though, perhaps, the husband's name would have (as in the case of an action) to be joined, yet such joinder would not make him liable, unless he did such acts as constituted him a principal, and the Court would recognise the custom of trading if certified by the recorder (*i. e.*, if the custom has been found by him) (b). On non-performance of the award, the contempt would not be a contempt of the City Courts, but of the Courts granting the rule, and the right of the wife to submit being admitted, the remedy would lie against her.

Sole trader by custom of London.

Power to submit to arbitration.

It could not, it is apprehended, be urged, that such submission would be an ouster of the jurisdiction of the City Courts, if so, the same principle would apply in every case where a submission was made a rule of any other Court than that wherein the action commenced; (c) besides, it must be remembered, that references are the voluntary acts of the parties, and by the custom the wife is a merchant, and the act is specially directed to the benefit of merchants and traders, and she having power to sue for simple contract debts would also be enabled to refer a dispute arising out of such contracts, or her remedy would be imperfect.

It is doubtful whether, under any other circumstances, a submission by a married woman would be valid. It would

(a) *Supra*, p. 28.

(b) *Hoare v. Harlop*, 1 Wilson, 9.

(c) *Infra*, *Making Submission a Rule of Court*.

Voluntary
separation.

appear by an observation of Lord Eldon, (a) that in the case of a voluntary separation she could have no rights in which her husband did not join, for he says, "by such separation a woman does not acquire such a character as may be called a civil widowhood."

Submission by
husband of
wife's chattels.

A husband can submit any chattels he hath in right of his wife to arbitration, for he may dispose of them, so also those she has in her character of executrix, or administratrix, and this shall bind the wife, because she cannot personate any one during coverture without the husband. (b). It is suggested (in a note in Roll's Abr.) that in the latter case a wife may submit to arbitration without her husband, for if he allows her a power of administration he must suffer her to act pursuant to the trust. But it is doubted whether, in consequence of such assent, she could submit to arbitration, for if it was necessary to bring an action the wife could not bring it, but the husband, though her name must be joined. (c)

Wife adminis-
tratrix.

Submission by
husband.

In a submission by a husband, matters relating to the wife are included, as debts due to her as administratrix or executrix, or a lease for years, and on the death of the husband the award is binding upon the wife. As where there was a dispute between the husband claiming a term of years in the right of his wife, and another person relative to the title, and the matter was referred to arbitration, and an award made of the term to the husband, the property in it was held to be changed by the arbitrament so as to amount to a reduction of the term into possession, and to defeat the wife's right by survivorship. (d)

Submission of
a term held by
husband in
right of wife.

(a) 2 B. & P. 105, *supra*, p. 28, note (c), *sed vide*, 9 East, 471, 4 B. & Ald. 419.

(b) Bac. Abr. tit. Awards (C).

(c) Com. Dig. tit. Administration (D).

(d) Williams on Executors and Administrators, p. 538, 1 Roll. Abr. 245, Arb. tit. (D).

Mr. Williams (in a note) also refers to *Hunter v. Rice*, (a) Specific property, award of. where Lord Ellenborough said, "that he could not conceive that certain property therein awarded was transferred by the mere force of the award." Though the estate of the wife may not be so changed by the award, as to be considered a reduction unto possession thereby, yet it is conceived the husband submitting the title to arbitration was such an act as showed complete ownership, if so it would be such a reduction into possession as would defeat the survivorship of the wife; the award does not change, but ascertains the rights to the property as they existed at the time of the submission, (when the question is a question of title).

So it is apprehended, that if the husband had died before the award was made, the right to the property would be in the executor, and not survive to the wife, even though there was no provision in the deed of submission, directing that the death of either party was not to act as a revocation, for though the submission is revoked the husband's assumption of the property is not revoked, for if he has once assumed the control it is apprehended it would require some distinct act on his part to re-vest the property in the wife, but no mere repudiation of the assumption of the property would have power to restore it to her in the original character of its holding. Death of husband before award.

After the husband has once assumed and exercised power over the property, if the wife again gains a right, it would be a right derived through her husband, and not in her original right, and though the death of the husband revoked the submission to arbitration, it did not revoke his assumption, for it was a perfect act, it was the exercise of an absolute right, and though the title to the property was open to a doubt, still it would not make any difference, for if the right Submission by husband of chattels he holds in right of his wife's effect. Award, effect of.

(a) 15 East, 100, *et infra*.

Award,
effect of.

was decided in his favour, it is not the creation of the right by the award, but the ascertainment of a right which was in existence at the time of the submission.

Award when
made has rela-
tion to the sub-
mission.

Where a wife was entitled to property as residuary legatee, and differences arose between her husband and the executor, and after the award, but before any other proceedings were taken the husband died, it was held the husband's executor took the money and not the wife, because the award was a sort of judgment (*a*), the payment by being directed to the husband changed the property, and vested in him and through him in his executor (*b*). The same reasoning would apply to this case as to that above, viz., that it was the submission and not the award which changed the property.

In cases where there is a suit, and certain arrangements are agreed to by the husband, and acts are required to be done before he can have the property in such case, if the husband died before the arrangements are complete, the Court of Chancery will decree survivorship to the wife if the husband's executors rely upon such arrangement as the only foundation of their title (*c*). The husband alone, by a

(*a*) The whole of the deliberation of the arbitrator is in the nature of a judgment, and is part and parcel of the award, but it cannot create a greater right than existed at the time of the submission, nor does the award change the property, for it must be enforced either summarily by attachment or by action.

(*b*) *Oglander v. Baston*, 1 Vern. 396.

(*c*) After a suit had been instituted by the husband and wife for her property, a treaty took place between them, settling the husband's claims thereon, he having been previously ordered by a decree to lay proposals before the Master for a settlement; after the terms had been finally settled by the solicitors, but before they were carried into effect the husband died. The Court decided such agreement did not bind the wife, and she was entitled to the property, because no act of the Court had altered the interests of the parties. (*Macauley v. Phillips*, 4 Vesey, 15.) If the settlement had been approved by the Court con-

submission, cannot bind the freehold property, which he has ^{Lands of husband and wife in right of wife.} in right of his wife, (a) and it is doubtful if the lands of which the husband and wife are seised of in right of the wife can be submitted at all (b); where the submission by the husband respects any property of the wife, which by his own act he cannot alien, an award which gives that property to another would not be binding upon the wife, as if the husband amongst other things submits the right to a manor, and the arbitrators award that the husband should give up to the other party a deed by which an annuity is secured to the wife out of the manor, the award cannot be enforced, because the right of the husband extends only to the accruing arrears of the annuity, and not to the annuity itself, but if the submission was jointly by the husband and wife, it seems not to be questioned but that both would be bound by the award; yet some doubt, because the only mode by which the freehold of the wife could be transferred was, by the solemnity of a fine. (c)

It, as a general proposition, may be said, that an infant ^{Submission by an infant.} cannot submit to arbitration, for if no one has joined in the submission with him, it is void. Yet if a man join the sub- ^{Joining in a submission with an infant.} mission, the submission is good (d) (as against him), and if

firming the Master's report, it would have been different. (Williams on Executors, p. 686).

(a) 1 Roll. Rep. 269.

(b) *Davis v. Page*, 9 Vesey, 350; *Emery v. Wase*, 5 Vesey, 846.

(c) *Kyd on Awards*, p. 47.

(d) "If it be urged that the agreement of all the parties to the suit was part of the consideration to constitute the arbitrator's power, and that the want of a binding consideration of the infant parties caused a failure of the consideration, the answer is, all knew they were infants, and must be presumed to know the law, and therefore had all the consideration they stipulated for, and the consent of those who could, and did, consent, was a sufficient consideration in point of law

it be a father and an infant, the obligation binds the father, and the infant may consent, or not at full age (*a*).

Attorney, represented by.

In a reference infants cannot be alleged to be represented by attorney, nor can an attorney bind his principal, as next friend to an infant, to become personally bound for the performance of the award when he attains full age (*b*), nor is an award that a bond shall be given by a guardian, that an infant shall, when he is of full age, convey certain land reasonable, for he may die or refuse to convey (*c*).

Guardian, bond by.

Chancery, practice in.

In the Court of Chancery when infants are parties to a suit, and a reference is deemed advisable, the usual course is to refer it to the Master to ascertain whether the reference would be for the benefit of the infants (*d*).

Surety for performance by infant.

Though an infant himself cannot be bound by a submission, yet if a person becomes surety for him, if the infant makes default, the surety forfeits the penalty (*e*). No case is cited, but it seems reasonable it should be so, for the promise of the surety must be taken as the consideration for the submission of the adult, for between him and the infant there would be no mutuality, for the infant might, or might not repudiate the award, and it is to prevent which, or rather to secure himself from loss, that the contract of the surety is required.

for the promise." *Wrightson v. Bywater and Others*, 3 M. & W. 305, Parke, B.

Application was, to set aside an award, on the ground of there being infants; "he knew who were the parties to the action, and the submission he entered into, and it would be unjust to allow him to take the chance of an award in his favour, and on failure, to set aside the proceedings, for a defect of which he was cognizant, when he entered into the submission." *Jones v. Powell*, 6 D. P. C. 483.

(*a*) Com. Dig. tit. Arb. (C.)

(*b*) *Biddle v. Dowse*, 6 B. & C. 265, Abbott, C. J.

(*c*) *Ibid.* 266, citing Lord Nottingham, 1 Ch. Ca. 279.

(*d*) *Watson on Awards*, p. 54.

(*e*) *Kyd on Awards*, p. 39.

An executor or administrator may submit any matter concerning the testator's or intestate's estate to arbitration, but if the arbitrator award to him less than his due, this, being his own voluntary act, shall bind him, and he shall answer for the full value as assets (*a*), and if the submission be without a protest against the reference being taken as an admission of assets, Lord Eldon said "it would amount to such an admission" (*b*); and Best, C. J., said, "if he does not protest in the first instance, he should not be allowed to do so afterwards; and Gaselee, J., in the same case said, "an award, that an executor shall pay a certain sum, is equivalent to a declaration that he has assets (*c*). In *Barry v. Rush* (*d*), Ashhurst, J., said, "Entering into the bond of submission, amounts to an admission of assets, and the bond was an undertaking to pay whatever the arbitrator should award without any regard as to assets;" and Buller, J., said, "I have no doubt the defendant was personally bound." So in the case of *Love, Executor, v. Honeybourne* (*e*) where the award was that the plaintiff should pay a certain sum to the defendant out of the assets in his hands, as executor, on a certain day; the Court of King's Bench, on the argument of a rule *nisi* to set aside the

Executor,
power to submit.

Award of
smaller sum
than due.

Effect of
submission.
Administration
of assets.

Submission by
bond by executor.

To pay from
assets in hand
as executor.

(*a*) Com. Dig. tit. Adm. (I. 1); *Yard v. Ellard*, 1 Lord Raym. 369.

(*b*) *Robson and Another v.* — 11 Rose's Bankruptcy Cases.

(*c*) *Riddle v. Sutton*, 2 M. & P. 355; *Worthington v. Barlow*, 7 T. R. 453, 8. P.

(*d*) 1 T. R. 692, was a submission by bond to perform an award, by which the defendant, as administrator, bound himself, heirs, &c., to the plaintiff, as executrix; the award was, that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l.*, and ordered general releases to be executed between the parties: on an action on the award, the defendant pleaded *plene administravit*, &c., which plea was held bad.

(*e*) 4 Dow. & Ry. 814. The reference was of the cause, and all matters in difference, between the plaintiff's testator and the defendant.

Provision for
death.

a provision in case of the death of either party, that it shall survive to his executors, &c., (a), the death of a party is no revocation, and the award is as available against the executors or administrators, as though it was made in the lifetime of the testator or intestate (b). Where in such a case the arbitrator awarded that the executor should pay the plaintiff a certain sum out of the assets of A.; on an action against the executor, the declaration stating that the defendant, the executor aforesaid, promised to pay, it was held that the executor was not personally chargeable therewith, but as executor only, and that the judgment must be *de bonis testatoris* (c).

Death after
award by order
of nisi prius.

If the award is made under an order of Nisi Prius, and the verdict is taken subject to an award, and either party dies after the award, judgment may be entered within two Terms after the verdict (d); if it is not entered up then, it has been considered that the Court cannot allow it to be entered up afterwards, (*nunc pro tunc*), unless the delay be attributable to the act of the Court (e); as where application is made to set aside an award, and the party dies pending the rule (f), or where the arbitrator has not made his award until two Terms after the verdict, and the party has died in the meanwhile (g).

(a) *Supra*, p. 16.

(b) *Prior v. Hemsrow and Dare*, Executors, 8 M. & W. 873.

(c) *Dowse v. Cox*, 3 Bing. 20. This judgment was reversed in the King's Bench, upon a different ground, the Court of Error declining to give any opinion upon this point, 6 B. & C. 255.

(d) 7 Car. 2, c. 8, s. 1. "In all actions, personal, real, or mixed, the death of either party, between the verdict and the judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict."

(e) *Copley v. Day*, 4 Taunt. 702. The rule of Court, Hilary Term, 4 Wm. 4, (Gen. Rules and Reg. 3,) does not affect this rule. *Blewett v. Tregoning*, 4 Ad. & Ell. 1002. *Lanman v. Lord Audley*, 2 M. & W. 535.

(f) *Bridges v. Smith*, 8 Bing. 29.

(g) *Miller v. Spurrs*, 2 M. & S. 730.

In the case of trustees it seems the rule is different from Submission by trustees. that of executors and assignees, for it was expressly held by Lord Eldon, C. J., that in a case of submission to an award by trustees to bind them, the plaintiff must show that they had effects of the trust estate in hand, for submitting to arbitration does not make them personally liable, and an admission by one that he had money of the trust estate in hand, was held insufficient to bind them all (a). But if they agree to pay what should be awarded, they become personally liable, and an attachment will go against them (b).

The assignees of a bankrupt have power to submit any Assignees of bankrupt, power to submit. matters relating to the bankrupts' estate to the decision of an arbitrator on one-third in value of the creditors assenting thereto, or in the absence of their attendance at a meeting properly convened, the commissioner may consent to the matter being referred, and the award of the arbitrators will be binding upon the creditors, (c) and the submission consequent thereon, may be made a rule of the Court of Bankruptcy. (d)

A general power to refer cannot be given by the creditors General power to refer.

(a) *Davis v. Ridge and Others*, 3 Esp. 101.

(b) *Wandsborough and Wandsborough v. Dyer*, 2 Chitty, 4. Trustees of an insolvent debtor, by entering into a bond to refer, confess assets, and by reference of all matters in difference, and agreeing to pay what should be awarded, they become personally bound, and are liable to an attachment.

(c) 6 Geo. 4, c. 16, s. 88.

(d) By a general order of January 12th, 1832, all agreements of reference to be made rules of the Court of Bankruptcy shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by such Courts.

1 & 2 Wm. 4, c. 56, s. 43, enacts that if the assignees agree to refer any matter to arbitration, such agreement of the reference may be made a rule of the Court of Bankruptcy.

General power to refer. to the assignee, but for each particular submission there must be an express assent by the creditors, or the commissioner, on their part. (a)

Submission, effect of. If the arbitrator does not stipulate that the award is not to be taken as an admission of assets, it will be construed to be so. In *Robson and Another v. ———*, (b) Lord Eldon said, he saw no distinction on this point between an executor and the assignee of a bankrupt.

Payment of assignees demand in wrong. Where an assignee makes a demand upon a person for money as due to the bankrupt's estate, and the person pays it, and on a further demand and an action and a reference (all matters being submitted) the arbitrator finds the defendant has overpaid and awards repayment, the assignees are personally liable. (c) Where a person becomes bankrupt,

(a) *Ex parte* Whitchurch, 1 Atk. 93. (b) *Supra*, p. 53, note (b).

(c) *Malcolm and Another, Assignees v. Fullarton*, 2 T. R. 645. Rule to set aside the award. Submission was to refer all matters in difference between the parties in the cause, &c., the award was that 700*l.* should be paid to the defendant, grounds of objection were as follows: first, the reference being for matters, &c., the arbitrator had exceeded his authority, in awarding a sum to be paid to the defendant, no cross demand having been set off in the suit; secondly, the plaintiffs, as assignees, had power only to refer the particular suit; thirdly, the award was to pay a sum by a day certain, which was an excess, for at all events the defendant's debt was capable only of proof under the commission, and he was only entitled *pari passu*, with the other creditors; "first, the reference was, between the parties in the cause," it is merely a description of the persons, and not of the *subject matter in dispute*; as to the last objection, if the debt had been due from the defendant, the bankrupt, it would have been well, but it is not so, the payment was made to the assignees after the bankruptcy, and in ignorance, which could not be proven under the commission, and the arbitrator could only award that the sum overpaid should be repaid. (Kenyon, C. J., 646). "Money paid under mistake may be awarded to be repaid by an arbitrator, unless it be a payment into Court under a rule of Court, then it is a payment on record, and the party can never recover it back, though it afterwards appear he paid it wrongfully." Buller, J., 648.

and afterwards trades without having obtained his certificate, and submits a matter arising in his trade to arbitration, and after award becomes again a bankrupt, the matter of the award belongs not to the second but to the first assignees. (a) Second bankruptcy, effect on an award.

Where there were several actions, and an award was made, and afterwards a commission of bankruptcy issued against the defendant, the reference being to ascertain certain rights and incumbrances, the Court on petition allowed the matter to be referred to the Master to ascertain the amount of the various incumbrances upon the property, regard being had to the award. (b) Before the statute of Wm. 4, c. 42, s. 39, it appears that the bankruptcy of one of the parties when entered into in any other way than at Nisi Prius was a revocation of the submission, and, it is presumed, would be held to be so now, or, if not, would at least be ground for the application to the Court or Judge under the statute, (c) but where the reference was under an order of Bankruptcy revocation.

(a) Phillips, Assignee of Acton, a Bankrupt v. Hopwood and Others, 1 B. & Adol. 619. The reference was by order of nisi prius, award, verdict for the plaintiff, subject to opinion of the Court. Acton was a bankrupt in 1813, and the bankrupt's effects were duly assigned under his commission, and that he had not yet obtained his certificate, that he continued to trade, and in 1825 he was again a bankrupt, the plaintiff was Acton's second assignee. Other facts were set out by the arbitrator, by which it appeared the plaintiff had a sufficient cause of action, if his title as assignee could be supported. "I think defendants entitled to avail themselves of the former commission, for the Lord Chancellor has no authority to issue a subsequent commission whilst the effects were still vested in the assignees under the former, citing Till v. Wilson, (7 B. & C. 684), and Fowler v. Costar, (10 B. & C. 42). Tenterden, C. J., the validity of a commission is a matter of law open to examination, Parke, J.

(b) *Ex parte* Coppard and Gates, in re Thornton, 1 Deac. & Chit. 102.

(c) Marsh and Others, Assignees of Rowe v. Wood and Another, 9 B. & C. 659. Before the bankruptcy of Rowe, reference by indenture to arbitration, declaration alleged as breach, the revocation of the sub-

Bankruptcy
revocation.

Affidavit of
bankruptcy.

Nisi Prius, though the award was made after the bankruptcy it was held not to be revoked, (a) and on the arbitrators directing a nonsuit the Court will grant an attachment after the defendant has obtained his certificate for the costs. (b) In the case of *Taylor v. Shuttleworth*, (c) one of the objections being bankruptcy before the award made, Tindal, C. J., said, by the affidavits it is not clear the party was a bankrupt, the affidavits are not of the fact of the bankruptcy, but only of certain proceedings which are not before us;

mission, pleas *non est factum*, bankruptcy of Rowe, and before award, the commissioner assigned, &c., all claim, &c., to the provisional assignee, demurrer to second plea, replication to the third, that after the assignment to the provisional assignee the plaintiffs were chosen assignees, &c. After the submission and proceedings, (Rowe became a bankrupt) the expense of which proceedings the plaintiffs seek to recover. The defendants revoked submission, all bankrupts effects pass to plaintiffs, they would not be bound by the award, so the defendants ought not. If the original submission binds not all it binds not any, and if from any *post facto* matter a submission becomes ineffectual as to one person, it is altogether void, therefore defendants were justified in giving arbitrator notice not to proceed, Tenterden, J., 664. It is the very essence of an arbitration that the submission should be mutual, and the award mutual and binding, and to continue so, an assignment under the commission destroys the mutuality. (Littledale, J., 665. *Ex parte* Kensheld, 1 Rose, 149, S. P.).

(a) *Andrews v. Palmer*, 4 B. & Ald. 250. Reference at nisi prius; after reference but before award, the plaintiff became bankrupt, the arbitrator made his award, and ordered the verdict to be entered for the defendant, two days after which the defendant was a bankrupt, no further proceedings were taken for nine or ten months on the award, when the defendant taxed his costs, and signed judgment, and took out execution; on motion, why judgment and subsequent proceedings should not be set aside on the ground that an assignment, under a commission by the statutes of bankruptcy, devested out of bankrupt all his estate. *Per curiam*, the bankruptcy did not operate as a revocation of the submission. It would not have put an end to the suit, at the plaintiff's instance, nor can it therefore put an end to the arbitration, (252).

(b) *Hanwell v. Thorogood*, 7 B. & C. 705.

(c) 6 Bing. N. C. 277.

this is a matter too grave to be decided on mere motion. (a) Bankruptcy revocation. Erskine, J., said, I agree the fact of the bankruptcy has not been made out, and if it were it would be no answer, though in *Marsh v. Wood* it was held that the bankruptcy might be held to be a revocation, where a person had power to revoke, yet where the party had not the power to revoke, the bankruptcy of either would not operate as a revocation. Assignee made a party to submission. If the assignees had been chosen, and the arbitration was pending, it would have been right to summon the assignees before the arbitrators, that they might take the defendant's place, but here the whole reference was gone through, except the ceremony of the award.

It may be said to be a general rule that when the reference is by order of *Nisi Prius* the bankruptcy of either of the parties is not a revocation of the submission, but when entered into in any other way it is. General rule, revocation by bankruptcy.

The assignee of an insolvent may also submit to an award Assignee of insolvent. by compliance with the regulations of the statute, (b) but the powers therein seem more limited than in the Bankrupt Act, for in that the arbitrator is empowered immediately by the creditors; but under the Insolvent Act, not only the assent of one-third in value of the creditors is necessary, but the consent must be confirmed by the commissioner, and there is no clause enabling the commissioner, in event of non-attendance of the creditors after due publication, to authorize the reference; the non-assent of the creditors, it is apprehended, would not be an available objection by the defendant as to the validity of an award. In the case of *Percy v. Roberts*, (c) which was a suit in equity, it was held

(a) 286, Tindal, C. J. citing *Marsh v. Wood*, 1 Rose, 149.

(b) 1 & 2 Vict. c. 110, s. 51.

(c) 1 Myln. & K. 4.

Assignees of
insolvent.

the non-assent of the creditors was no ground of objection on the part of the defendant, and therefore, by analogy, the suit in equity and the submission to arbitration being included in one section, and governed by the same clause, would be governed by the like rules, it was held that the judgment would be (notwithstanding the want of the assent) binding upon the creditors, and that the assignees took upon themselves the responsibility, that the suit was properly instituted and conducted. The clause is a protective clause as against the creditors, but if the assignee chooses to incur the risk, there can be no reason why he should not; if he enters into the reference without reservation he renders himself personally liable to the other party to the submission, for the costs, (a) and, therefore, as in the case of the assignee in bankruptcy, he should specially guard himself. In the case of *Hobbs v. Ferrars*, (b) which was an application to set aside an award, one ground of which was the discharge of the defendant under the act. Rolfe, J., said, as a general proposition, I think insolvency would act as a revocation, but the case was decided upon other grounds. (c)

Insolvency
revocation.

Discharge
under insolvent
act, effect.

(a) *In re Wandboro'*, 2 Chit. R. 40, *supra*.

(b) 8 D. P. C. 779.

(c) *Hobbs v. Ferrars*, 8 D. P. C. 779. Action commenced in October, 1838, all matters in difference were referred by a Judge's order. In the following January plaintiff was arrested, and in July before the award was made was discharged under the Insolvent Debtors' Act, the arbitrator gave notice to the attorneys on both sides of his intention to proceed with the award, the defendant's attorney alone attended, the proceedings were *ex parte*, and the award was in favour of defendant; on the 26th of Sept. notice was given to both of its being ready for delivery; plaintiff called several times at the arbitrator's chambers, and requested to have a copy of the award which was given in November; on the 9th of May, 1840, the present rule was obtained by the assignee of the insolvent to set aside the award, on the ground that, firstly, the authority was revoked by discharge of plaintiff under Insolvent Act; and secondly, for proceeding in the ab-

In partnership and other deeds it is usual to insert a clause that in the event of differences arising between the parties that the differences should be referred to some particular person named, or in event of not being named, to be selected by the parties; it is sometimes as the Attorney General for the time being, or some other known person shall appoint; but it is apprehended that such a clause, whether the person is or is not named would be no bar to a suit upon the matter in difference, for such an agreement cannot oust the jurisdiction of the Court, (a) and the same rule holds in the Courts of Equity, (b) unless under very peculiar circumstances. (c)

Clause to refer
in partnership
and other
deeds, effect of.

sence of one of the parties. The question of the revocation was not entered into; as to proceedings *ex parte*, held not made out, for the attorney had notice; application of this description must be made within two Terms, Abinger, C. B., 781. The Court ought not to decide a point like this on an application which will deprive the parties of all opportunity of bringing a writ of error, Alderson, B., 782. As a general proposition I am inclined to think insolvency would act as a revocation, Rolfe, B.

(a) Hill v. Hollester, 1 Wils. 129; Thompson v. Charnock, 8 T. R. 139, S. P.

(b) Street v. Rigby, 6 Ves. Jun. 815. A. and B. agreed to be partners, on usual covenants, with power, on notice, to dissolve, and to refer disputes to arbitration. "In strict law, it cannot be maintained, that having covenanted to refer, the party has covenanted to forbear to sue, if not, he has only left himself open to an action for damages, if he does not refer, which the suit does not prevent, (821). It has not the effect of barring a legal remedy, then why should it an equitable one? the competency stands upon the same principle, (822). I do not think, at present, this Court has, on such a covenant, any right to say the party has bound himself, by any agreement, not to resort to the equitable jurisdiction of the Court," (823.) Eldon, Ch. (Agar v. Macklow, 1 S. & S. 418.)

(c) Waters v. Taylor, 15 Ves. 10. The agreement contained a most particular and anxious provision, that in the event of differences, the matters should be submitted to arbitration. The application was for a foreclosure of a mortgage upon the opera house, and that the defendant should be removed from the management, upon the ground of incompetency, and that a receiver might be appointed, Lord Eldon,

Clause to refer
in partnership
and other
deeds, effect of.

The 3 & 4 Wm. 4, c. 43, s. 39, provides that a submission, containing a clause, &c., but that must be held to relate to such submissions as are entered into by the parties with a clear knowledge of what differences were to be referred, there the agreement to make the submission a rule of Court is part of the actual writing so to be made a rule of Court as therein mentioned, but the mention in another deed that on differences arising that they shall be referred, and that the submission made in accordance with the clause shall be made a rule of Court, (a) is a something beside the submission mentioned in the act, which plainly refers to a submission *in esse*, containing such a clause, if so it would appear to establish a distinct principle in the matter, and these clauses to refer in partnership deeds are nugatory, unless covenanted in a sum as liquidated damages for the non-performance of the conditions, with a defeasance in event of the condition being complied with, and the action would be not for not entering into the submission but for the non-performance of the conditions of the bond. In a case where it was agreed in a deed in event, &c., to refer disputes to a person named, and both the parties called upon him to make his award, which he did: this cannot be said to be a submission consequent upon the clause in the deed, but was clearly a submission by parol (oral), and which was held to be binding upon the parties after the award was made; (b) if either had revoked before the award, it is doubtful whether the Courts would have interfered, for though the reference was in accordance with the terms of

The parties
calling upon
the referee
named to make
his award.

Ch., suggested they should go to arbitration, and that the Court does not interfere with the management of a joint concern, unless to wind it up, and he refused to appoint a manager, (13), and said this case was to be distinguished from every other, (15).

(a) *Vide In re Woodcroft v. Jones*, 9 D. P. C. 538.

(b) *Gate v. the Bishop of Carlisle*, Watson on Award, p. 8.

the deed, the submission could not be considered to be an incorporation therewith, but is a something appointed to be done extra thereby, and therefore, until it is *in esse*, it is considered there cannot be said to be an incorporation, (a) as in the case of *Bright v. Durnell*, (b) the arbitrators were appointed under the plaintiffs' deed, but not the umpire, and on non-agreement about the choice the plaintiff revoked the submission, and arrested the defendant. (c)

Clause to refer in partnership and other deeds, effect of.

Partners cannot enter into a submission to arbitration without the assent of their fellows, for such matter is no part of the business of a trading concern, (d) and where the reference was between a firm of five persons and another person, and three out of the five signed the submission, and the time was enlarged by the other two, in conjunction with the other three, it was held those not signing the submission were not bound by the award, (e) and though a partner is

Partners, submission by.

(a) The case of the amalgamation of the oral into the written submission, is essentially different, for in that case it is only effectuating the intention of the parties with respect to ascertained differences, but here the matter may or may not happen, and is not with the assent of the parties reduced into writing, unless by a new assent of both. (*Supra*, p. 12.)

(b) 4 D. P. C. 756.

(c) *Bright v. Durnell*, 4 D. P. C. 756. Rule nisi to stay proceedings, and that plaintiff should pay costs. *Contrà*, from affidavits, it appeared, that the plaintiff and defendant were partners, and the partnership deed stated, on dispute, the matter should be referred to two persons, who were to appoint an umpire, before the commencement of proceedings, and that the causes of complaint, &c., should be reduced into writing, which was done: amongst other things, the plaintiff alleged he had been fraudulently inveigled into the partnership; each named an arbitrator, and as they could not agree about an umpire, the plaintiff revoked the submission, and arrested the defendant for 200*l.*, which he had received to the plaintiff's use. Held, not a case within the act, because an umpire has not been appointed, and until he is appointed, the reference cannot go on. (757).

(d) *Best, C. J., Steed and Others v. Salt*, 2 Bing. 103.

(e) *Ibid.*

Partners, submission by.

Difference between partners.

not bound his refusal is a breach of his (the undertakers) promise, (a) and even where the submission is of a matter in difference amongst themselves, the same rule applies, and which is so strictly enforced, that though the deed or submission on the face of it appears to have been signed by all, yet if all are not proved to have signed the deed, on attempt to enforce the award by action, it will be a ground of nonsuit, on the principle that as it was a reference of the aggregate accounts between the parties, it would be necessary to prove the signature of all, for the consideration for entering into the submission was, that the accounts of all should be liquidated; and Lord Ellenborough said the principle was so strong that it needed no authority to support it. (b)

Joint and several submission.

Where parties enter into a submission, and agree jointly and severally to refer their disputes to arbitration, and to be jointly and severally bound for the performance of the award, each is bound to perform the whole of the award, not only that awarded against himself, but that against the other also. (c)

(a) *Strangford v. Greene*, 2 Mod. Rep. 228. The enlargement of the time could not have been construed as a new submission, for it was entered into by strangers to the first, and though they might be named therein as partners, yet the absence of their signatures would be a fatal objection for a stranger's joining in enlarging the time, would be no more affected by the award, than an award would be vitiated by a stranger signing the award, with an arbitrator or umpire. (*Infra*, *Umpire*.)

(b) *Antram, Assignee of Hawkes, Bankrupt, v. Chase and Others*, 15 East, 109.

(c) A. and B. had been the succeeding tenants of a farm, and they entered into an agreement with the in-coming tenant to refer all matters, &c., and to be jointly and severally bound to the performance of the award; the award was, that A. should pay a certain sum to the in-coming tenant, and that B. should also pay a sum, &c., but it was not awarded to be paid jointly. Lord Kenyon, C. J., held, by

Where the submission is by A. and B. of one part, and C. of the other part, of all matters between them, an action by A. or B. alone against C. is (can be) submitted, for it shall be taken distributively. (a) It is doubtful whether the arbitrator could decide any matter in difference between A. and B., unless such intention was very plainly expressed in the submission, (b) as in a reference by partners three partners entered into a bond to refer all matters in difference, and gave another bond to the other three, conditioned to perform the award, &c., it was held that an award in favour of one obligor against another was good, and that, though an action could not be had on the bond, it might upon the award. (c) Where partners submit their affairs to the decision of an arbitrator, he is bound to adjudicate upon the whole matter submitted, and if it appears upon the face of the award, that the award is not as between them thoroughly fair, the Court will not enforce it. (d) So if the stipulation in the submission be that the arbitrator shall dissolve the partnership or decree such acts to be done in accordance with the submission as shall amount to a dissolution, such award will be binding upon third persons, and if

Submission by
partners *inter*
se.

Dissolution of
the partner-
ship.

the terms of the agreement, they had promised jointly and severally, which makes them responsible one for the other. (*Mansell v. Burridge and Another*, 7 T. R. 352; *Kyd on Awards*, 45, S. P.)

(a) *Com. Dig. Arb.* (D. 4.)

(b) *Garland v. Noble*, 1 J. B. Moore, 187.

(c) The partners of a firm, entered into two bonds of submission, for the reference of disputes and matters of difference, three against three, agreeing to be severally and mutually bound, it was contended that an award against an obligor in the bond, in favour of another, could not be maintained; but it was held that it could, because the intention of the parties was, that all matters in difference should be referred, not merely as between the three against the three, but as against each individually. (*Winter v. White*, 1 Brod. & Bing. 357, *et seq.*)

(d) *Wood v. Wilson*, 1 C., M. & R. 241.

Dissolution of
partnership.

the award be acceded to, the partners will be absolved from the future contracts of each other. (a) So also when partners (*inter se*) refer all matters in difference, the arbitrator may direct the partnership to be dissolved, and in a case where it was sworn that at the trial after a juror was withdrawn, and the rule of reference drawn up, the plaintiff openly declared he would not have it understood that the arbitrator had power to dissolve the partnership, "Lord Mansfield, C. J., observed, that is a sufficient evidence out of his own mouth, that the dissolution of the partnership was then a matter in difference," (b) but if power be given to the arbitrator to award a dissolution of the partnership, it is not obligatory upon him to do so. (c) In a submission by a firm the assets only of the firm are liable, and no sum due

Submission,
effect of.

(a) *Heath v. Sansom and Evans*, 4 B. & Adol. 172. Assumpsit against the defendants on promissory note for 300*l*. Sansom and Evans were partners, and it was agreed that the partnership accounts, their respective liabilities, the mode of winding up, and the manner and time of the dissolution, should be referred; it was agreed each should bid, before a referee, for the machinery, and he was to declare the highest bidder the purchaser; Sansom was the highest bidder, and the utensils, &c. were assigned to him; three months afterwards, he was called upon to pay an account for 300*l*., which he owed, and gave the bill in question, in his own and late partner's name. On this evidence, Lord Tenterden held, there had been no actual dissolution, and a verdict was found for the plaintiff. A rule nisi was obtained, that the partnership was dissolved, when Sansom purchased the works, (173). I am of opinion, that a rule for a new trial must be made absolute, because Evans, when the note was given, had ceased to be a partner. Denman, C. J. (175.) The ex-partners dissolving the partnership is ambiguous; it may import a dissolution of the joint tenancy in the goods belonging to the firm, or the putting an end to their mutual dealings, and authority for one to bind the other: after possession by Sansom, it never could have been in contemplation that he should bind the other by future contracts. Parke, J.

(b) *Green v. Waring*, 1 Wm. Black. 475.

(c) *Simmonds v. Swaine*, 1 Taunt. 549.

by any partner in his individual right can be set off against a debt of the firm. (a)

The power to refer when stipulated for in partnership deeds, if it is at all effectual, can enure only to the party entering into the deed, and cannot be construed to survive to his executor or administrator (b). Power to refer in partnership deeds surviving to executor.

Where a suit and all matters in difference between partners are referred, the Court of Chancery will not entertain a bill to settle the partnership accounts, or if filed it will be dismissed (c). Interference of equity.

Public companies are governed upon similar principles to common partnerships, though the remedy is not by attachment but by mandamus, as where a company was empowered by an act of Parliament to sue and to be sued in the name of one of its officers, and he submitted the cause of action to arbitration, a mandamus was issued against the company to compel it to perform the award, Lord Public company.

(a) Reference by firm of an action by partners, it was proved, before arbitrators, that one of the plaintiffs had received a sum of money from the defendant, before the partnership, and the arbitrator allowed it to be set off. Held, that the award was bad, for when a cause is simply referred, the record should be looked at. (Tindal, C. J.)

(b) *Tattersal, Administratrix v. Grote*, 2 B. & P. 131. Covenant for the payment of money on agreement to enter into a partnership, and in event of a dispute, to be referred to two arbitrators, each covenanted to abide by the award; a year after the partnership was dissolved and the intestate deemed himself entitled to a return of his money; the dispute was referred, and he died before any award was made, and the administratrix thereon conceiving herself to be entitled in his place, named a person on her part, and requested the defendant to do so. Breach was, refusal to nominate an arbitrator, the defendant prayed over, and demurred generally. Joinder in demurrer, whereon judgment was for the defendant. Arbitrators were not authorized to consider whether any of the money should be returned.

(c) *Wilkinson v. Page*, 1 Hare, 276.

Public company.

Mansfield, C. J., said, "for if the treasurer was held to be personally liable no treasurer (or public officer) would ever submit to a reference (a).

Corporations sole and aggregate.

Corporations sole or aggregate may, if not disabled, submit disputes relating to the corporate property to arbitration, and their successors will be bound thereby; but in the case of corporations aggregate, it must be the act of the whole corporate body, as by the dean and chapter, the mayor and commonalty, the master and his fellows.

Submission by agent.

If a man authorizes another to refer a dispute on his behalf to arbitration, though the submission is entered into in the name of the agent reciting the circumstance, it is sufficient, and the award may be against the principal, though he is not a party to the submission (b); but if the agent expressly binds himself then both are bound (c), for the binding himself would be the consideration for the other party entering into the submission, and that though the agent was not interested in the proceeds to be received by the award.

Submission by attorney.

An attorney at nisi prius has power to submit the cause to the decision of an arbitration (d), and thereby to bind his

(a) *Corpe v. Glynne, Glynne v. Corpe*, 3 B. & Adol. 804.

(b) *Cayhill v. Fitzgerald*, 1 Wils. 28, *etiam* 58.

(c) *Alsop v. Senior*, 2 Keb. 707, 718.

(d) Application was made to set aside the order of nisi prius upon the ground that Lord Falmouth had given his attorney no authority to refer, and that he was not bound by what his attorney did. Bayley, J., said, "I know of no authority which gives us power to set aside the arrangement of the parties at nisi prius; and Bolland, J. said, where there was fraud or great misconduct the Court might interfere." (*Thomas v. Hewes and Others*, 2 C. & M. 527, *et seq.*)

client, though he expressly desired the attorney not to consent to a reference (a), and we have seen (b) that the acts of the attorney during the adjudication of the arbitrator have been held to be binding upon his principal, and to amount to a new submission, or it might be more truly said the revival of the lapsed one. The power of the attorney seems to be confined to the referring the cause (at the trial) at nisi prius only, on the principle, it is presumed, that it is the attorney only whom the Court recognises in governing the proceedings, and that the client is bound by the act of the attorney (c). In any other stage of the proceedings the attorney would be the mere agent of the principal, and all things which would be deemed necessary to give an agent authority would be required to authorize an attorney to refer (d).

Submission by
attorney.

In the Court of Chancery it is doubtful whether a solicitor has the same power to refer as an attorney has at common law (e), perhaps on the ground of the peculiar jurisdiction of the Court of Chancery, which affects to regard the particular rights of each individual concerned, and by the recognition of such rights and the laxity of the pleadings, as

Solicitor in
Court of Chan-
cery.

(a) On an application to the Court upon affidavit and before the arbitrator had taken any steps other than appointing a distant day for hearing the matters in dispute, Mansfield, C. J., said, "there would be no end of these applications if the Court were to interfere, for such interferences would lead to collusions," he distinguished between this case and that of the Mayor of Morpeth v. Lord Carlisle, 3 Taunt. 378. (Filmer v. Delber, 3 Taunt. 486.)

(b) *Supra*, p. 9.

(c) *Latush v. Pasherante*, 1 Salk. 86; *Rex v. Northampton*, 2 Bott. 716, S. P.

(d) If an attorney enters into a bond without the express authority of his principal under a condition to be void upon the performance of the award by the principal, it will bind the attorney and not the principal. (*Bacon v. Dubarry*, 1 Ld. Raym. 246.)

(e) *Colwell v. Child*, 1 Ch. Ca. 86.

Solicitor in
Court of Chan-
cery.

compared with those of the common law Courts, renders, in some particulars, the solicitor not so immediately the officer of the Court as the attorney in an action at common law, a Court of equity will minutely enter into the particular rights of each individual concerned, whilst a Court of common law will not travel out of the record; besides, it must be recollected, that arbitration is an aid to a Court of law, and the very principle upon which it is instituted is, that a full and equal measure of justice should be administered between the parties, and which, in a Court of common law, cannot be always attained (*a*), unless resort be had to arbitration, but such is not the case in a Court of equity, for there the Judge can not only administer to the rights of the parties according to law, but can enter into the equity of those rights, and, therefore, in Chancery the need of arbitrations is not so great, as the jurisdiction contains within itself every necessary for the settling of apparently conflicting claims, and is, doubtless, the reason why a more stringent rule is applied to references in Chancery, with regard to the solicitors' power of referring the cause.

Remedy
against
attorney.

Where an attorney refers a cause against the express assent of his client, the only remedy would be by an action against him for damages (*b*).

(*a*) *Supra*, p. 4.

(*b*) *Filmer v. Delber*, *supra*, p. 53.

ARBITRATOR.

An arbitrator is a judge elected by the persons themselves, ^{Who may be.} and every one who is of sane mind, and not under disability, may be selected for the office (*a*).

An infant cannot be an arbitrator, nor a person who is not ^{Who cannot.} *sui juris*, as a villein, nor a person dead in law, as a monk, nor a man attainted of treason, or felony (*a*). So also an arbitrator should be indifferent, for by considering himself as the agent of the person appointing him, he breaks a most solemn engagement (*b*). A party cannot arbitrate in his own cause (*a*).

When an arbitrator is appointed, the Court, unless mis- ^{Protection of} conduct is shown, are bound to protect him in the course of the Court. his duty (*c*); and when it appears he has heard and weighed all the matters adduced, he is to form his judgment, and act accordingly, and the Court will presume his conclusions are just (*d*). His jurisdiction extends over all matters comprehended in the submission, and any excess of jurisdiction, unless it be of a matter capable of severance, vitiates the award; so also if he does not decide all the matters submitted to him, and over which he has jurisdiction, his award is bad (*e*).

(*a*) Com. Dig. Abatement, B. & C.

(*b*) *Calcraft v. Roebuck*, 1 Ves. Jun., 226, Lord Hardwicke.

(*c*) *Beddington v. Southall*, 4 Price, 234, Graham, B.

(*d*) *Scott v. Van Sandeau*, 1 Q. B. Rep. 107, Lord Denman, C. J.

(*e*) *Bowes v. Ternie*, 4 Mylne & Craig, 165. The arbitrators have declined to arbitrate upon some matters included in the submission, and therefore the award is bad, (162), and as the arbitrators supposed, they were precluded from arbitrating thereon by reason of a suit pending between the vendor of the annuity and the defendant

Authority of
the arbitrator
wherefrom de-
rived.

Judge of law
and fact.

The authority of an arbitrator arising, as it does, from the assent of the parties, his award can in no way be held to affect the rights of persons strangers to the award (*a*). He is sole judge of all matters of law or fact, whether he be a barrister or is an unprofessional man (*b*). Though formerly distinctions were made between professional and

to set aside the purchase; the Vice-Chancellor justly decided the reason assigned for not adjudicating upon the claims is wholly untenable, if barred by a release, the arbitrators would have been well justified in deciding against the claim upon that ground, but they do not decide against the claim, but decline to arbitrate, held, award void, (165), Cottingham, Ch.

(*a*) Arbitrators are in the nature of Judges, and in some respect have a greater latitude, not being confined within the rules of law or equity. (*South Sea Company v. Bumpstead*, 1 Taunt. 52, *is notis*). "He may decide against a right which bears hard upon a person, but which having been acquired legally, could not be resisted in a Court of Common Law, and an award would never be set aside upon that account." (*Knox v. Simmons*, 1 Ves. Jun. 369. Lord Thurlow, Ch.)

"The Court cannot take upon itself to say an arbitrator has mistaken the law, if he says I meant to make my award according to law, and have misconceived the law, or have mistaken the fact, the award shall be set aside, for in either case it is not his award. In a reference of a cause, and all matters in difference, an arbitrator ought to consider not only the legal but the equitable demands." Lord Mansfield, C. J. (*Delper, Assignee of Bunn v. Barnes*, 1 Taunt. 48). This was a case where the arbitrator allowed a conscientious demand.

"The authority of an arbitrator is derived from the consent of the parties, and no instance can be produced in which strangers have in any way been held to be affected in their rights by an award, either as evidence of right or of reputation." (*Evans v. Reece*, *infra*, Denman, C. J.).

(*b*) "The arbitrator is a Judge of all matters of law and of fact, and the Court will not interfere unless a matter of law is raised by the award." (*Armstrong v. Marshall*, 4 D. P. C. 595, Patteson, J.).

"When parties appoint a barrister an arbitrator, they appoint him a Judge of the law as well as of the fact, and it has been the practice to refuse any application on the merits of the decision." (*Perreman v. Steggal*, 9 Bing. 681, Tindal, C. J.; *Lancaster v. Hennington*, 4 Ad. & Ell. 347, S. P.).

non-professional men, but that distinction is now rightly Judge of law
abandoned (a), for parties selecting arbitrators would na- and fact.

(a) A few of the cases are appended, by way of showing the oscillation of the Courts, until the rule became settled as above; *Ching v. Ching* was the first case wherein the principle as laid down above was allowed.

To set aside on ground of error, "the rule of Court which gives the superintendence of the cause to the arbitrator, gives the Court also a superintendence over the award, the merits are clear, we think it a case for interference, rule unless defendant will allow alteration." (*Rogers v. Dallimore*, 6 Taunt. 114, Gibbs, C. J.)

If an arbitrator acts directly against law, the Court will set aside the award but if in a matter of mixed law and fact he mistakes some points, they will not therefore set aside the award. (*Wohlenberg v. Lageman*, 6 Taunt. 255).

Jupp v. Grayson, 3 D. P. C. 200. There is no reason for a distinction between a legal and a non-legal arbitrator, *Lyndhurst, C. B.*

Ashton v. Poynter, 3 D. P. C. 201. "I am at a loss to find any distinction between a legal and a non-legal arbitrator, and that an award made by the latter may be impeached on a point of law, though not that of the former; to support such a distinction you must infer that both the parties intend that the arbitrator should decide according to law, when they know he has no knowledge thereof." *Jupp and Grayson* has decided the point.

The distinction between a professional man and a non-professional man is abandoned, and when persons refer they must abide by the decision of the arbitrator. (*Huntig v. Rullin*, 8 D. P. C. 879, Parke, B. *Ching v. Ching*, 6 Vesey, Jun. S. P.).

"Where the merits in law and fact were referred to a person competent to decide upon them, we will not open an award unless it be shown to be so notoriously against justice and his duty as an arbitrator, that we could infer misconduct on his part." (*Westmore v. Forbes*, 13 East, 358, Ellenborough, C. J.). "When the question of law necessarily arises upon the face of the award, the Court must notice it." *Le Blanc, J.*

"This is a reference to mercantile men, and they may have decided the question upon merchant usage. I do not go the length to say that where an arbitrator proceeded upon a mistake of a clear principle of law, that the Court will not set aside the award." (*Richardson and Others, Assignees v. Nourse and Another*, 3 B. & Ald. 239, Abbott, C. J.). "Where the objection is that an award is

Judge of law
and fact.

Questions
arising alto-
gether on the
merits.

turally choose those they deemed most fitting for the purpose, whether the decision was of a matter of law or fact—for it might be a merchant was a more proper man than a lawyer to decide the particular question at issue, and it was often, upon the principle of natural justice, a very hard case that the purposes of justice should be defeated by a mere error of form as to the rules of law and of evidence, and the expense and trouble, therefore, to count as nothing. For a question arising altogether upon the merits, the Court cannot set aside an award (*a*), and the same rule holds in equity (*b*) as well as in law (*c*).

contrary to law, it should appear very clear indeed to induce the Court to set it aside." *Best, J.*, 240.

"Unless an illegality clearly appears upon the face of the award, the Court will not interfere." (*Cramp v. Symons*, 1 Bing. 104).

"The admission or inadmission of a witness is a question in the discretion of an arbitrator, and was a question of law which has been decided by him, you must take his law for better and worse." (*Symes v. Goodfellow*, 2 Bing. N. S. 533. *Tindal, C. J.*).

"Motion can be only for error on legal grounds for error in fact, it must amount almost to misconduct." (*Ashton, Executors and Others v. Poynter*, 2 D. P. C. 651. *Parke, B.*)

"We think the arbitrator is in error as to the effect of the pleadings, yet we think that he in whose favour the error is made, cannot avail himself of it to set aside the award, we have no power to correct the award." (*Moore v. Butlin*, 7 Ad. & Ell. 601, *Denman, C. J.*).

"The error of the arbitrator is no ground for setting aside the award." (*Philips v. Edwards*, 1 D. & L. 465, *Abinger, C. B.*). "The award is good upon the face of it, it is better to abide by the general rule, though injustice be done in the particular case." (*Parke, B.* 466, (*ib.*)).

(*a*) *Winter v. Lethbridge, Bart.*, 13 Price, 533.

(*b*) *Knox v. Symmonds*, 1 Ves. Jun. 369. On ground of erroneous judgment a person cannot come to set aside an award, (370).

(*c*) Having submitted to a Judge chosen by themselves, the parties give to his acts an authority which the Court would not allow to their own. "If the objection that the award amounts to champerty or maintenance can be sustained, I am satisfied the Court has almost daily decreed a violation of the law." *Lord Eldon, Ch.* (1 Swant. 58).

If an arbitrator simply awards a certain sum due, or Judge of law and fact. things to be done, and which he directs are to be in satisfaction of the cause of action, unless he is particularly directed to any given point, it is in general sufficient, for he is not bound to state the reason of his decision, and when matters of law and fact are referred, his award is final and conclusive; and if he is silent as to the law, the Court cannot interfere with him, though he is wrong (a); and so in *Aitcheson v. Cargay* (b). Chief Justice said, "I believe there never has been an instance in which an arbitrator has been considered as required to set out his means of proceeding to his conclusions. It has been considered sufficient if he found a certain sum was due, to put an end to the suit."

Where an inconclusive reason for arriving at a decision is stated upon the face of the award, or in a paper delivered therewith, and which was held to be a part of the award, it was held that such statement made the award bad (c), but in two later cases it was held not to do so, and which appears to be in accordance with the rule that the arbitrator is sole judge of the law and facts presented to him for his adjudication (d).

(a) *Boutillier v. Thick*, 1 Dow. & Ry. 366.

(b) 11 Price, 57.

(c) Arbitrator made his award, and delivered therewith a paper which showed the reason of his conclusion; held such must be taken as one decision, and as founded on the reasons stated it is wrong, for he proceeded on a ground which cannot be supported in law. (*Kent v. Elstot and Others*, 3 East, 20, Grose, J.) "It is not necessary that the arbitrator's reasons should appear on the face of the award to enable the Court to examine them." Lawrence, J. held, as the reasons were bad the award could not be supported.

(d) "Trespass, not guilty and justification, award, defendant has not proved his pleas, therefore verdict must stand, and stated unsatisfactory reasons to warrant the conclusion. From what appears on the face of the award, the decision is not satisfactory, though it may be upon the merits, it is sufficient if the matter has come before the

Mistake of fact
apparent upon
the face of the
award.

A mistake in a matter of fact, apparent upon the face of the award, or appearing by the affidavit of the arbitrator, is decided upon a principle very different to an error in law, for the award made is not that intended by the arbitrator, and therefore the meaning of the parties in entering into the submission is not effectuated (*a*), and the Court will set

arbitrator, and he has adjudged thereon." (*Archer v. Owen*, 9 D. P. C. 341. *Coleridge, J. Benet and Another v. Wilson*, 3 D. P. C. 220, S. P.)

(*a*) The arbitrator made an error, and directed payment to be made by plaintiff instead of defendant, who refused to allow an alteration of the award. "He has exercised his judgment, but the award does not correspond with it, we have power only to set it aside." (*Ward v. Dear*, 3 Adol. & Ell. 234).

On reference to an attorney's bill, on motion to refer it back to the arbitrator, as allowing too much for copying an abstract. Lord Lyndhurst, C. B., said, "If the arbitrator intended to adopt the proper rule, and did not, it is not his award, and the question is whether the rule adopted is the correct one." (It was ascertained it was, and rule was discharged. *Broadhurst v. Darlington*, 2 D. P. C. 38).

Where an arbitrator by mistake deducted instead of adding certain sums, and admission was that a sum of money was due to Hinds, the arbitrator directed Hinds to pay Hall a certain sum. On this double blunder being pointed out, the arbitrators requested Hall to allow them to right it, which he refused. The Court said, "we cannot help thinking in a case like the present we have power to give some remedy; we consider the mistake a mere clerical error, and at the same time it is so gross as to amount, though not in a moral point of view, yet judicially to a misconduct on the part of the arbitrators, and we think we do not exceed the jurisdiction of the Court when we give relief under circumstances like the present," the Court made the rule for setting aside the award absolute. (*In re Hall and Hinds*, 2 M. & G. 853).

Phillip v. Evan, 13 Law Journ. 80. Reference of cause and all matters in difference before trial to a barrister; the defendant admitted he was indebted to plaintiff in 82*l.* 3*s.* 8*d.* for goods sold and money lent, and in 119*l.* 7*s.* 4*d.*, the amount of plaintiff's goods sold by the defendant under a distress for rent, the arbitrator omitted the 119*l.* 7*s.* 4*d.* by error, and on the mistake being pointed out, acknowledged his error; award, the plaintiff is indebted to the

the award aside. Lord Eldon laid it down as a rule, "that where there is a clear and distinct evidence of a mistake, and that it is made out to the satisfaction of the arbitrators (as to which Lord Thurlow insisted upon having their affidavits); the Courts, both of law and equity, will interpose the one by setting aside the award, the other by refusing to make it a rule of Court. This expression of opinion occurred in a case where, on a letter being found after the award was made, and on its being stated the letter was lost, evidence was admitted of the postscript, which was said to be the material part, but it was said by one of the arbitrators, on seeing the letter, "If I had seen the letter, I should have acted otherwise," this does not fall within the reach of the rule, that the Court will disturb an award upon a mistake admitted (*a*).

Mistake made out to the satisfaction of the arbitrator remedied.

Where an award is rendered of no avail through some defect, the Court, on a new trial, will not allow the costs of the first, unless specially provided for in the rule of Court (*b*);

defendant on plea of set off, 100*l.* 0*s.* 6*d.*, and which sum exceeds the damages sustained by the plaintiff, and which amounts to 94*l.* 13*s.* 4*d.* the arbitrator made no affidavit; the Court refused to set aside the award.

(*a*) *Anderson v. Darcy*, 18 Vesey, 449. Every thing, both fact and law, is referred to the arbitrator, and though he decides wrongfully, there is no help for it; when he prays the aid of the Court, the Court has interfered and given an opinion.

In a case (*Ives v. Metcalf*, 1 Atk. 63), where marriage articles were shown to one arbitrator only, and the other swore, had he seen them, he believed he should not have made such an award, it was held the award was unfairly obtained.

"Arbitrators are judges of the parties' own choosing, and therefore they cannot contend against an award as an unreasonable judgment, or as a judgment against law." (*Campbell v. Twemlow*, 1 Price, 89; *Ridout v. Payne*, 3 Alk. 486, S. P.) This last was a question as to the admission of evidence.

(*b*) *Wood v. Duncan*, 5 M. & W. 87. A cause was referred, and the award set aside, and a new trial was obtained. The case is ana-

Costs of second trial when not allowed.

Costs of second trial when allowed.

but where the second trial is caused by the obstinacy of one of the parties, as where the arbitrator had made a mistake, and the application to the Court was that it might be sent back to be reconsidered by the arbitrator, the Court were of opinion they could not do so without his consent; on his refusing, and the verdict being found for the plaintiff, the Court allowed the costs of the first trial, it being occasioned by the obstinacy of the defendant (a); so, where there was an alleged error of the arbitrators, which was endeavoured to be taken advantage of by a plea of set off at the trial, the circumstances being as follows:—

The dispute was, whether a bale of silk, value 246*l.* 3*s.*, had been bought by the plaintiff of defendants, or of A., and whether they were entitled to set the same off against a bill of exchange, the question was referred by a Judge's order, and the arbitrator awarded that the plaintiff was entitled to recover on the bill, and the defendants were not entitled to set off the like sum of 246*l.* 3*s.*, for a bale of silk. At the trial it was proposed to show that the plaintiff was indebted to the defendants in a sum of money less than 246*l.* 3*s.* for a bale of silk; it was admitted the arbitrator had adjudicated concerning the bale of silk, but that they had only adjudged that the defendants were not entitled to set off the precise sum, and had not declared that the plaintiff was not liable to some extent. Lord Tenterden held the evidence to be inadmissible, and, on argument for a new trial, he said, the real question is, where after a reference and an award, the defendants can, in an action of debt on award, annul it on the ground that the decision of the

logous to a *venire de novo*, and must be governed by the practice which has prevailed in cases of that kind. (Abinger, C. B. (89). Rule was obtained to review the taxation the Master not having allowed the costs of the first trial; rule discharged.

(a) *Payne v. Bayley*, 2 Brod. & Bing. 308.

arbitrators proceeded upon a mistake, he said he was not aware of any authority nor was any cited, and if it could be done, it must be by some plea to the declaration (a). Rebuttal of award on ground of error.

The authority of an arbitrator extends over all things and incidental to the submission, and where he finds facts and draws a conclusion therefrom, though it be one at which a Judge would hesitate, his decision is final—more conclusive than that of a jury—absolutely final (b). It extends not only over actions at common law, but suits in equity, and where a bill was filed praying an injunction on reference of the cause and matters in difference, it was held the arbitrator had power to restrain the plaintiff on equitable grounds, from recovering all they were entitled to at law (c). So where an arbitrator by his award directs a bill in equity to be dismissed, he must be understood to have decided conclusively the right of the parties, with respect to all the matters which were the subject of the suit in equity (d). Authority of an arbitrator.

Award, dismissal of Chancery suit.

He may direct actions to be brought in the name of the other of the parties to the submission, and that without directing that an indemnity should be given against the costs (e), and if, in accordance with the terms, as the con- Of actions to be brought in name of another.

(a) *Johnson v. Durant and Another*, 2 B. & Adol. 930.

(b) *Barrett and Another v. Wilson*, 3 D. P. C. 220.

(c) *Reeves and Another v. McGregor and Another*, 9 Ad. & El. 581.

(d) *Lord Tenterden*, citing *Knight v. Burton*, 1 Salk. 75. *Pearse v. Pearse, infra, Award.*

(e) "It is said that the arbitrator has exceeded his authority, by ordering actions to be brought in the name of the defendant, we think not; if he had merely to decree which had a right to receive the bills of costs, I should have thought it impliedly within the scope of his authority to direct the use of the name of the defendant, but it does not rest here. It is said because it may expose defendant to costs, therefore award is not final; such contingent liability forms no part of the disputes which the arbitrator was called upon to settle; it is a something which may arise out of the award, a possibility of new disputes, from which no award can exempt the parties concerned. It

Restraint of
trade.

Evidence,
power over.

What are
matters in
difference.

sideration for the dissolution of a partnership, he may direct a restraint upon trade (a).

All questions as to the admissibility or the inadmissibility of evidence are matters within his discretion (b). So he may demand the production of books of account though relating to old accounts, for it is within the discretion of the arbitrator what matters are in difference, and if it had been intended to except the old accounts it should have been mentioned in the submission (c).

is urged the arbitrator might have awarded an indemnity against the costs that might have given rise to new disputes." (*Burton v. Wigley*, 1 Bing. N. S. 670, *Tindal*, C. J.).

Reference to settle price of certain premises; award directed purchase, and after conveyance defendant should be entitled to the use of the plaintiff's name to enforce his rights. "The use of the plaintiff's name was a matter in the discretion of the arbitrator, and he might, had he pleased, have specified the terms on which defendant was to indemnify plaintiff against an action. (*Round v. Hatton*, 10 M. & W. 661, *Abinger*, C. B.).

(a) *Morley v. Newman*, 5 Dowl. & Ryl. 317. The parties were surgeons, and it was a covenant in the submission that the plaintiff should carry on the business for his sole benefit, the arbitrator awarded as part of the conditions of dissolution of partnership, that defendant should not during the lifetime of the plaintiff carry on business in or within thirteen miles; held, under the general terms of the submission, the arbitrator had power to award on the terms in question. *Abbott*, C. J. (318),

(b) *Wynne v. Wynne and Wife*, 9 D. P. C. 911. On a meeting before the arbitrators, the certificate of a trustee was tendered, and rejected, on account of his being alive; award was in favour of defendants, to set aside on the ground that the plaintiff was misled by decisions of the arbitrator. (You do not say you would have called Colonel Wynne, *Erskine*, J., 904). The affidavits did not say so, but they distinctly alleged surprise, and it was in consequence of the rejection of the certificate in evidence that he did not produce evidence of disapprobation. (You could not have offered a certificate in evidence to prove that, *Tindal*, C. J., 90). You come not prepared with sufficient materials, because you do not say you would have called Col. Wynne).

(c) *Aukbuckle v. Price*, 2 D. P. C. 175.

The arbitrator may also inquire after other matters than those actually in difference (a). Inquiry after things not submitted.

He may direct that one of the parties shall go before a commissary, and verify the vouchers in question before him (b). To go before a commissary to verify vouchers.

He may in his award, direct that certain goods shall be paid for at the market price (c). Payment at market price.

In a case where the reference was by partners on one side, one of whom had been outlawed, the arbitrator refused to consider the claim respecting the outlawry, and which the Court held right, for in outlawry the proceedings are either against the person or property, when against the person they cannot apply to both, for one only was arrested, if their joint property was taken, it should have been shown so in the affidavit (d). Injury to one defendant only, decision of arbitrator.

Where the arbitrator, by the terms of the submission, is required to state, at the request of the parties, certain matters for the opinion of the Court, and he states the Statement for the opinion of the Court.

(a) Reference was of railway shares, and the objection was, that the arbitrator inquired of other shares besides those in question. "The objection goes to the merits of his decision, he had all the papers before him, and doubtless satisfied himself that the calls referred to by the parties were unpaid; if ten acres of land had been the matter in dispute, he might, if necessary, have inquired about other acres." (*Eastern Company Railway v. Robertson*, 1 D. & L. 499).

(b) *Atkins v. Baldwin*, 1 Stark. 209.

(c) Award of broken material (iron) at such sum of money as same amounts to, according to the present price of pig iron; disallowance of claim as for work in a perfect state, and that the materials shall be paid for at the market price is good, (*Wade and Another v. Downman*, 1 D. & L. 564. *Abinger, C. B.*). "The market price is the price of iron on the day on which the award is made, unless he went to market he could not make his award otherwise." *Alderson, J.*, *ib.* (365).

(d) *Gibbs, C. J., Garland and Another v. Noble and Another*, 1 J. B. Moore, 187.

Duty of arbitrator in reserving points for opinion of the Court.

various propositions broadly, and that he has overruled them; if this overruling is correct it is a sufficient statement of the matter for the Court (*a*), (*i. e.* where and in such case he has power to reserve the points for the opinion of the Court) for, it is his duty to draw the necessary inferences from the facts (*b*). The clause is an enabling, and not a compulsory one, for without it the arbitrator has power to state a case for the opinion of the Court, and if he pleases he may refuse, and such refusal will not vitiate the award (*c*). In *Clarke v. Stocken* (*d*) a rule nisi was obtained to revoke the submission, on the ground that the arbitrator had declined to state specially upon the face of the award, the facts and grounds of his decision which the submission authorized him to do, the Court refused to make the rule absolute, but declined to lay down any general rule upon the matter, holding the application to be answered by the affidavits filed by the plaintiff. And in another case where the arbitrator found on all the issues subject, to the opinion of the Court (according to the submission) putting the matter in the alternative, as they found, so was verdict on the issues to be, but no question was left as to the mode in which the verdict was to be entered ultimately, on that the Court gave

(*a*) *Jay v. Byles*, 3 Moore & Scott, 86.

(*b*) *Jepson and Another v. Hawkins and Another*, 2 M. & G. 366.

(*c*) *Wood v. Hotham*, 5 M. & W. 675.

An arbitrator refused to pledge himself to raise any particular objections on the face of an award, saying he should reserve such points only as appeared to him of sufficient importance; on a motion to revoke submission, Lord Denman, C. J., said, "We are of opinion that the arbitrator takes a correct view of his duty, if there be a reservation the Court will decide, if there be an omission of any thing which the defendant deems should appear, he can avail himself of the stipulation in the order of reference, (to reserve points of law) and call upon us in consequence to set aside the award." (*Scott v. Van Sandean*, 1 Q. B. R. 107).

(*d*) 5 D. P. C. 35.

no opinion, leaving the parties to shape the finding of the count on the record (*a*).

If the arbitrator, without authority, states a case for the opinion of the Court, and does not determine the matters submitted to him, the award would not be good (*b*), in such case he must decide the points of law and the facts, for if he finds only the facts the award would be inconclusive, and when he has found the matters, he may add, if the Court agrees with him, then, the award is so and so (*c*), but there must be a finding of all the matters submitted (*d*). Statement of case without authority.

Where the arbitrators receive evidence at a meeting improperly convened, at which neither of the parties attended, and of which notice was given to the parties, and on an objection being made, it was agreed to strike it out, and the arbitrators swear it made no impression upon them; the Court will not, in such case, make void the award (*e*). Improper reception of evidence.

The examination of the witnesses should be conducted

(*a*) *Walter v. Lacy*, 1 M. & G. 54.

(*b*) The arbitrators, without authority, stated points of law for the Court, and found them. Had the arbitrators abstained from deciding the points of law, and simply found the facts, the award would not have been good, as not being final, and it would be so if the Court refused to entertain any question as to the points of law as not being properly raised, all subsequent to the decision of the arbitrators is inoperative, and need not be regarded. (*In re Wright and Others v. The Cromford Canal*, 1 Q. B. R. 102. Denman, C. J.).

(*c*) Reservation without authority; if the Court consider on this statement that the plaintiff is entitled to recover in the action, then I determine for him, and order defendant to pay damages and costs; held conclusive by all the Court but Bolland, B. (*Barton v. Ransom*, 3 M. & W. 327).

(*d*) Arbitrator without authority, reserved a point of law without deciding it for the opinion of the Court, and a rule nisi was to refer the matter back to the arbitrator to find positively; the Court thought the finding insufficient, and unless the defendant consented the cause must go down to trial. (*Ferguson v. Norman*, 4 Bing. N. S. 52.)

(*e*) *Kingwell v. Elliott and Others*, 7 D. P. C. 423.

Examination of witnesses, how to be conducted. in the presence of all the parties, that each party may have an opportunity of cross-examination; if a witness is examined in the absence of either of the parties, unless he had due notice, it would amount to a surprise, and invalidate the award (a). In a case where the arbitrator swore that the reason of his examining a witness in the absence of one of the parties was, that he had come a long way, and he examined him to save expense, it was held that the award ought not to stand (b). If the arbitrator is requested to examine a witness before the award is made, and refuses to do so, such refusal would render the award bad, in such a case he should appoint a day, unless the parties are all present, and though the arbitrator may not examine witnesses behind the back of one of the parties, yet he may ask a question of a witness for his own information (c), but it is presumed the question must relate to the prior examination of the witness, for it is said, "if there appeared any surprise, or the question had been brought about by the defendant's attorney, it might be a good ground of exception" (d). But in no case can an arbitrator make his award unless he examines the witnesses, and receives the necessary evidence (unless upon the express stipulation of the parties), even though he has

Requested to examine witnesses.

Asking witness a question.

Duty to receive evidence.

(a) *Pepper v. Graham*, 4 Moore, 148. The arbitrators in absence of a party proceeded in a reference. They declared that they could not go on further, without the examination of some books, whereupon defendant left; they afterwards examined a witness, in the absence of the defendant, and then declared that the examination of the books was unnecessary, and signed a minute of their award, which was not executed until after an application to set it aside was made. Held, that the defendant should have had notice of the arbitrators' determination, and it was immaterial whether the motion to rescind was before or after it was made. (149.) (*In re Hicks and Others*, 8 Taunt. 696, S. P.)

(b) *Richards, C. B.*, *Beddington v. Southall*, 4 Price, 232.

(c) *Atkinson v. Abraham*, 1 Bos. & P. 175.

(d) *Eyre, C. J.*, *ibid.*

a thorough knowledge of the subject of the dispute, as where a dispute concerning a carriage was referred to a coach builder, who refused to examine witnesses upon the matter, but went and saw the vehicle himself (a). In this case application was made to the Court to revoke his authority, the Court held it was no ground for such revocation, but for setting aside his award; it is not misconduct, but he was bound to examine the witnesses.

The examination of the parties is a matter entirely in the discretion of the arbitrator (b). In a case where, after the first meeting, the arbitrators refused to allow the attorneys to attend, and subsequently the parties themselves, the attorneys protested against such a proceeding, but gave no notice that they should consider it as a ground of objection, when the award was ready to be made, the defendant revoked his submission. Abbott, C. J., said, "as the witnesses were to be examined separately, I do not think the arbitrators might not examine them at their homes as the arbitrators were honest" (c). The objection should have

Duty to receive evidence.

Examination of the parties.
Examining witnesses at their homes and excluding the attorneys and parties.

(a) *Phipps v. Ingram*, 3 D. P. C. 670.

(b) *Wells v. Benskin*, 9 M. & W. 45. Reference to settle all matters in difference, and to examine upon oath, &c.; the arbitrator examined both the parties as to the whole of their respective cases, and upon all the matters referred, and made his award in the favour of the plaintiff; on cause being shewn against the award, Parke, B., said, "The order of reference leaves it entirely in the discretion of the arbitrator to examine the plaintiff or defendant, when and to which of the matters referred he thinks fit." (46.) Rule refused.

(c) *Warner v. Bryant*, 3 B. & C. 590. Reference by order of Nisi Prius, all matters in difference in the cause, and to examine the parties, if he pleases, on oath; the defendant proved his case by an indifferent person, and the plaintiff was the only person to rebut his evidence the defendant objected to the plaintiff being examined in support of his own cause; the arbitrator examined the plaintiff, and the motion was to set aside the award on this ground. *Per Curiam*.—"We think the terms sufficiently large to empower the arbitrator to

Examining witnesses at their homes and excluding the attorneys and parties.

been made at the first exclusion, and notice should have been given of reliance thereon as an objection, or the arbitrators would go on thinking the objection was waived, and unnecessary expense is thereby incurred; when the parties apply to a private tribunal, the mode of conducting it should be left to the arbitrators, and there may be circumstances under which it might be important to exclude the attorneys, there is less reason for excluding the parties, but where both are excluded there is no ground of complaint (a)."

Examining witnesses in the absence of the parties.

The Courts are exceedingly jealous at the exclusion of the parties, and as the principle upon which an award should be conducted, is that the decision of the arbitrator should not be subjected to the slightest suspicion, it follows, if circumstances occur which may in themselves be innocent, but are open to suspicion, the Court will vacate the award, unless the most full and satisfactory explanation be given, as where an indictment for obstructing the river Thames, and an action for a nuisance were referred to the same gentleman, after the meetings before the arbitrator were ended, and the case closed, in all but making the award, the plaintiff went into a room in a public house, and found therein one of the witnesses and the legal adviser of the defendant (a special pleader) and the arbitrator, before whom was a map (brought by the witness a water bailiff) of the *locus in quo*; on the plaintiff's requesting to be allowed to attend, the arbitrator refused, stating that he had sent for the witness to give him some information, by which his judgment would not be biassed; the award was published; the arbitrator and spe-

examine the parties for any purpose, under an order framed like the present; we think that the arbitrator may examine a person in support of his own case."

(a) *Hewlet, and Another, Executors v. Laycock*, 4 Car. & P. 574.

cial pleader both refused to make any affidavit, but the water bailiff swore that nothing passed upon the occasion in question, except with reference to the pier, the award was held bad. Lord Denman said, "the meeting in question was, to a certain degree, held for the purpose of making up the arbitrator's mind; some information was received from the witness, but none should be, in the absence of either party, unless by consent, or by a specific provision in the order of reference: where a party on such an occasion as that in question, is refused permission to be present, which ought not to have been refused, such an irregularity raised in his mind a suspicion as to the justice of the arbitrator, and the mischief cannot be cured. The matters of both proceedings formed the subject of one inquiry, and his Lordship held the Court could not make any distinction between them, and that the objection was fatal to the whole award (a). And so also it was held, in a case in the Rolls Court, in which the arbitrator, by consent of the parties, took all the books home with him for the purpose of having them examined by an accountant, after which no meeting was held of which the complainant had notice, and the arbitrator made his award. The accountant, who was employed by the arbitrator, stated that the arbitrator and the defendant came to his office two several times, at neither of which was the plaintiff present, and that at the request of the accountant, the arbitrator saw the plaintiff, and heard all he had to say, but in the absence of the defendant, but previously to which meeting, the plaintiff had sent the arbitrator a long letter relative to the matters in dispute, to which no answer was given. Lord Langdale, M. R., said, "the meetings between the arbitrator and the defendant were relative to two

Examining witnesses in the absence of the parties.

(a) *Sir R. Dodson and Sutton v. Groves*; *Reg. v. Sir R. Dodson*, 9 Jurist, 86.

Examining
witnesses in the
absence of the
parties.

disputed items, of which the explanations are given by the defendant, and the plaintiff is bound thereby, this is very improper, for no one ought to use means likely to affect the mind of persons acting in a judicial character, and one cannot be allowed to use means unknown to the other. It is reported that Lord Eldon said, if a fact of this kind be brought forward, the guilty person cannot be heard to make the complaint; in the present case the acts of the defendant were not spontaneous on his part. There is a letter written by the plaintiff to the arbitrator, which is extremely improper; my rule is to hand over to the other side all communications made to me in a cause by a party, to the opposite side. This is a matter in which justice is concerned, and not a matter merely between the parties who are litigant, but one which concerns the public. I am not satisfied the arbitrator went beyond the power incident to his office, but he deviated from the course which justice demands (a).

Where the parties agree that at a certain time all the evidence which the parties have shall be produced, the arbitrator may refuse another meeting, unless it be said that fresh evidence will be produced, and in such case the affidavit to the Court, stating the matter should be from the party, and not by the attorney, because he could only know what evidence could be produced but through the defendant (b).

(a) *Harvey v. Skelton*; *Skelton v. Harvey*, Rolls Court, 13 Law Journal Rep. N. S., 466,—the award was ordered to be set aside.

(b) *Kinger v. Joyce*, 1 Marsh. 404. Reference of an action for work and labour; it was agreed that the third meeting should be the last, when all the evidence was to be produced; the plaintiff, at that meeting, laid accounts before the arbitrator, on which the award was founded. The defendant afterwards applied for another hearing, alleging general possession of evidence to counterbalance the effects of the accounts; the arbitrator refused, on the ground of irregularity. "In this case, it was agreed that the third meeting was to be the last, another meeting was in the discretion of the arbitrator, and at the last

Where, by the terms of the submission, the examinations of the witnesses were to be on oath, affidavits cannot be read, for the meaning must be that the evidence should be received *vidæ vocæ* (a). Examination on oath.

Where, on a submission, it was stated the examination of the witnesses should be upon oath taken before me (a Judge), or other Judge or commissioner, an objection was made before the arbitrator, that the clause took away his power to swear the witnesses, which he overruled: on application to set aside the award therefore; Parke, B., said, "the act provided, if it be agreed in the submission that the witnesses shall be examined on oath, the arbitrator has power to administer it; if the word *only* had been mentioned, it might have taken away arbitrator's power; the present condition is improper, and ought not to have been introduced." Power to administer an oath.
Construction of statute.
Rule discharged (b).

If the arbitrator is not required to examine the witness on oath, and he does not, it is no ground to set aside the award (c). Under the statute 3 & 4 Wm. 4, c. 42, the Court of Chancery has no power to order the attendance of witnesses (d). In the Courts of Common Law; under this statute, the rule for the attendance of witnesses under a submission made a rule of Court (e) is absolute in the first instance. Not examining witnesses on oath.

If upon the service of a proper notice the parties do not Proceeding, *ex parte*.

meeting there was nothing said about the present evidence, (405). An affidavit should have been from defendant, because the arbitrator could only know from him." Gibbs, C. J.

(a) *Banks v. Banks*, 1 Gale, 46.

(b) *Hodsell v. Wise*, 4 Mees. & Wels. 538; *James v. Atwood*, 5 Bing. N. C. 628, S. P.

(c) *Ridout v. Pye*, 1 Bos. & Pul. 91.

(d) *Hall v. Ellis*, 9 Symons, 530.

(e) *In re Guaranty Society v. Levy*, 1 Dowl. & L. 907.

Proceeding,
ex parte.

attend before the arbitrator, or if they refuse to attend, with a view to prevent justice, and defeat the object of the reference, the arbitrator may proceed (a) *ex parte*, but it requires a very strong case to be made out, to justify such proceeding. In a case, the circumstances of which were as follows: Coleridge, J. held, the arbitrator was not justified in proceeding *ex parte*. A notice of meeting was given, at which the defendant did not attend; he afterwards stated he had engaged counsel, who was out of town, and could not attend, and it was sworn in answer, that inquiry had been made at the chambers of the counsel, and it was said he had not been spoken to. Another notice was given, marked peremptory, when it was served, the defendant said he should not attend, and wrote a note to the arbitrator, stating as his reason the shortness of the notice, and his wish not to proceed with the business during the Vacation; another notice was given, not marked peremptory, nor did it state proceedings would be taken during his absence, but the plaintiff's attorney, in serving the notice, said he should require the arbitrator to proceed *ex parte*, and hear the plaintiff's evidence, in event of the defendant not attending: the defendant did not attend, nor state any reason. The arbitrator then proceeded *ex parte* (b). From the above it would appear that a positive and absolute refusal, "with a view to prevent justice," alone, would entitle the arbitrator to proceed *ex parte*, or such conduct as would amount to a refusal, as a day being fixed for hearing particular evidence, and its non-production without reason assigned; or it might be the service of notices marked peremptory—but the only safe course would appear to be an application to a Judge or the Court, to

Leave of Judge
to enable the
arbitrator to
proceed *ex*
parte.

(a) *Ex parte* Wood v. Leake, 12 Vesey, Jun. 412, Lord Eldon, Ch.

(b) *Ex parte* Gladwin v. Chelcoate, 9 D. P. C. 550.

enable the arbitrator to proceed *ex parte*, unless the evidence was produced, or the party attended, as was done in the case of *Hetley v. Hetley (a)*. So it was held, permission could not be given to revoke a submission upon an *ex parte* application to a Judge at Chambers, and in a case where the submission was so revoked, the Court of Common Pleas made the rule absolute for rescinding the Judge's order, and Tindal, C. J. said, "It appears to me that no order can be pronounced by the Court, or by a Judge, unless both parties have been heard, and as the order was obtained in the absence of the plaintiff, it is the same thing as if the order had never been procured at all," and Park, J. said, "that before a party's rights are to be concluded by a rule or order, an opportunity must be given him, to be heard" (b).

Revocation on
ex parte state-
ment.

Application to
a judge for
leave to revoke.

An arbitrator has no power in any way to delegate his authority, not even to a gentleman associated with him, he may ask the opinion of his fellows, but the judgment must emanate from himself (c).

Delegation of
authority.

He may consult a third person as to his opinion upon a

Consulting a
person for
information.

(a) Kyd on Awards, p. 101.

(b) *Clarke v. Stocken*, 5 D. P. C. 34.

(c) A. B. and C. were appointed arbitrators, A. and B. differed, and stated to C. their opinions, (C. was a barrister,) and left to his decision the point of law; C., before leaving the meeting, declared that his opinion was with A., but gave no opinion upon the law, but said that he would look at the authorities. The arbitrators did not meet again. The award was drawn up in Birmingham, and sent up to town by the barrister's clerk, for A. to sign it, which he did, but at a different time. "A. and B. refused to have anything to do with the point of law, but where is the principle of law which delegates such judicial authority? for the parties to a submission have a right to the joint judgment of the arbitrators on each and every point submitted thereby. Held bad." (*Little and Others v. Newton*, 2 M. & G. 336, *et seq.*, Tindal, C. J.)

Consulting a person for information.

particular point; as a builder, as to the necessary repairs of a house (a); a barrister, as to a point of law (b); but the opinion of the person consulted must not be taken with the intention of abiding by, but as an aid by which a conclusion may be arrived at.

Power given by the submission.

Where the submission contained a provision that the arbitrators should have the assistance of a valuer, and in the award, after deciding certain things, they said, in which opinion A. concurred, Lord Lyndhurst, C. citing *Emery v. Wase*, (*supra*) held that it was no delegation of

Defendant admitting certain items.

authority (c); and in the same case, Lord Brougham said, the arbitrators might call the defendant before them, and ask him whether he admitted certain items, and it was not because he added words upon any other matter which they did not attend to, that thereby the award should be

Direction for certain things to be done as third person directs.

rendered void. But where an award directed that repairs should be performed, not in any specified way, but to the satisfaction of a third person, Lord Denman, C. J. said, "It is a delegation of their authority, and therefore the award is bad;" and Littledale, J., in the same case, said, "It is the body and essence of the thing, and cannot be rejected" (d); and Lord Kenyon, C. J., said, "An award that if the defendant certified on oath that he had paid a particular sum, it was to be considered as paid, if not, he was to pay it, was not a determination of the point in dispute before the arbitrator, but a delegation of his authority, and that the person delegated was most unqualified to judge" (e); so where an award was that a certain sum of money should be paid to one of the arbitrators, to be dis-

(a) *Crosscroft v. Hickman*, 2 Sim. & Stu. 130.

(b) *In re Hare Milne and Haswell*, 6 Bing. N. C. 162.

(c) *Anderson and Others v. Wallace*, 1 Cl. & Finnelly, 26.

(d) *Tomlin v. The Mayor of Fordwick*, 5 Ad. & Ell. 152.

(e) *Pedley v. Goddard*, 7 T. R. 76.

posed of according to the equities of the parties, Lord Denman, C. J., said "it was bad, for, over him, the Court had no control" (a).

It is clear that any delegation of a judicial act is bad, for the arbitrator has no power to subject the parties to the control of other persons than those they themselves have selected, and that only to carry out the particular purpose, and during a certain time, (*viz.*, before the award is made), but if it be of a ministerial act, it is different, as a direction to pay a certain sum per acre of land, to be measured by an able measurer in the presence of one of the arbitrators, for it is only a means of ascertaining the quantity of the land (b), so an award that one shall pay 10% to the other, and for the security of payment, such an one be bound in an obligation by the advice of counsel, or that upon payment of the money the other should give a general release as fully and beneficially as counsel shall advise, for it gives no power to do a judicial act; their authority being only ministerial; the arbitrator has directed the extent of the release by ordering it to be general, the counsel has only to see that it is so drawn as to have that effect (c). A recommendation that the parties should consent, that a receiver should be appointed by the Court of Chancery, after directing that the amount was to be divided, was held not compulsory but directory, and left them at large, and if they did not approve of the scheme, it was mere surplusage (d). An award of costs to be settled by a stranger would be void, for in him it would be a judicial act (e), but if to be settled by the Master it is a ministerial act, for that is one of the objects of his appointment.

Delegation of
authority.
Judicial act.

Ministerial act.

(a) *In re Mackay and Others*, 3 Ad. & E. 360.

(b) *Kyd on Awards*, 127.

(c) *Ibid.*

(d) *Lingood v. Eade*, 2 Atk. 513.

(e) *Watson on Awards*, 88

Enlargement
of the time.

Where the submission, or order of reference gives the arbitrator power to enlarge the time for making his award, as an award to be made on a day named, or, on any other day to which he should enlarge the time for making his award, the meaning is, that he shall have sufficient time to make his award, and if he cannot make it on the day named, he may, at any other time he pleases, and whether he names the ultimate day at once, or at a subsequent time, it is immaterial (a), and such power applies not to one enlargement only (b).

Computation
of time.

Where the original time is expressed in months, as six months; lunar months are intended (c); and where the enlargement was until a certain day, and the award was made upon that day. It was held by Williams, J., after taking time to consider, that "the word *until* may be construed inclusive, or exclusive, in the present case it meant inclusive of the day on which the award was to be made (d)."

Until a day
named.

Affidavit of the
enlargement
of time.

Where the time was said to have been enlarged, according to the power contained in the submission, and appeared to be so by *their* indorsement thereon, the Court said, the fact of the enlargement, not only ought to appear on oath, but also, that the enlargement was within the original time, and that it was made known to the defendant before he could be punished for a contempt of Court for disobeying the award (e).

Enlargement
when to be
ratified by
Judge's order.

Where the terms of a submission are, that the arbitrator may enlarge the time by indorsement upon the submission, which is to be ratified by a Judge's order, the indorsement

(a) *Payne v. Deakle*, 1 Taunt. 509, Mansfield, C. J.

(b) *Barrett v. Perry*, 4 Taunt. 658.

(c) *In re Swinford v. Horn*, 6 M. & S. 288.

(d) *Kerr v. Jeston*, 1 Dowl. N. S. 539. Patteson, J. held the word 'till Tuesday, in an order for time to plead to be inclusive of Tuesday.

Dakins v. Wagner, 3 D. P. C. 535.

(e) *Wohlenberg v. Lageman*, 6 Taunt. 111.

must not only be made, but also the Judge's order must be obtained to confirm it, before the expiration of the time (a).

Where the submission contains power to enlarge the time, until a day named, or such ulterior time, as the arbitrator shall signify by indorsement, under his hand on the order of reference. It was held such indorsements apply to the enlargements only, which are made after the time stated (b).

In all cases, the enlargement of the time, must be made a part of the rule of Court, or the award upon the face of it will not show that the Court have power to deal with it, since it will not appear to be made under the submission or within the time limited (c). The enlargement may be made

Enlarging part
of rule of
Court.

Enlargement
of time, by
whom made.

(a) *Reid v. Tryat*, 1 M. & S. 3. Where the order of reference empowered the arbitrator, to enlarge the time to such a day as the arbitrator should appoint in writing, under his hand, to be indorsed upon that order, and the Court of King's Bench or Judge thereof should order; several enlargements were made by indorsement, but without a Judge's order to ratify them; the enlargements were afterwards made a rule of Court; the award was held bad, because the enlargements were not in accordance with the terms of the submission, and therefore the arbitrator, when he made his award, had no authority. (*Mason v. Wallis*, 1 Man. & Ryl. 87.)

(b) *Davidson v. Gauntlett*, 1 Dowl. N. S. 198.

(c) *Halden v. Glanwell*, 5 B. & C. 390, S. P. The King (in aid of *Mytton v. Hill and Others*, 7 Price, 636. A day was named for making the award, which was not made upon that day, but some time after, and the defendant refused to extend the time. The solicitor to the extent swore, that all matters were discussed and closed before the arbitrator on or before the period for making the award and that the award was prepared on or before that day, and stated as the arbitrator's reason for not delivering the award—that he never heard of any objections, but on the contrary, after the period fixed he had received from the defendant a copy of a letter which he had sent the arbitrator, requesting him to reconsider the subject of his allowances, and was informed that he declined any further opening of the discussion, &c.

"The question is, is this award good or not? *prima facie* it is not,—

Enlargement
of time, by
whom made.

by the parties or the arbitrator (a). It is not necessary that the enlargement of the time should be actually written, unless so expressed in the submission, an appointment of a future day, in the presence of the agents of both parties without objection, was held by Parke, B., to be a due enlargement of the time (b). Where the parties, by their conduct, recognise the power of the arbitrator, after the time for making his award had expired, as by writing him a letter requesting him to reconsider parts of his award. Garrow, B., said, he considered it an authority equal to a rule of Court (c).

Where the time is irregularly enlarged, and the parties attend, their attendance before the arbitrator amounts to a recognition (d), and such recognition is a waiver of any

not being made in time, unless the parties by their conduct have signified their assent, and an extension thereof; I think in this instance they have done so." (Richards, C. B. 611.)

"This would be a clear case if it stood only upon the letter of the defendant's solicitor, for that was an express recognition and assent, and no verbal dissent could destroy the effect of that letter. This, beyond all doubt, amounted to an express assent to enlarge the time." Graham, B.

(a) *In re Smith v. Blake*, 8 Dowl. P. C. 131, *et seq.*

(b) *Burley v. Stephens and Wife*, 1 M. & W. 159.

(c) Reference by Judge's order with power to enlarge by indorsement on order; as Court of Common Pleas or a Judge thereof should order: time was enlarged four times. Judge's order and the indorsements were made a rule of Court. It was objected, the enlargement of the time was not within the terms of the reference and that the Judge's order to enlarge was essential, the award recited the order of reference, but not any of the enlargements. Held, if the attendance upon the prior enlargements was a waiver it would not apply to the last: arbitrator had no authority when the award was made; we cannot presume a Judge's order was obtained merely because a rule was drawn up, if produced, it would appear upon the face of the rule which would run on reading." (*Mason v. Wallis*, 10 B. & C. 109, Bayley, J.)

(d) *Supra*, p. 9.

irregularity, but the recognition of a breach, is not a recognition of after-breaches, and, therefore, of every breach, there must be a recognition, or the award will be bad, but the recognition must be with a knowledge of the fact of the laches; which would be presumed, in a case where it should be properly known to both parties, as where they are acting in contradiction to the terms of the submission (a). Where the arbitrator allows the time to expire without enlarging it, the Court will direct judgment to be signed, unless the defendant will consent to its enlarging it (a verdict had been taken at the Assizes). Coleridge, J. (b), said, "it was not necessary to lay down a rule that the Court would interfere in all cases." In a prior case, the Court of Common Pleas refused to give leave to enter up judgment, on the ground that the time expired without any fault of the defendant (c); but where the time expired by

Waiver.

Expiration of time by laches of arbitrator.

By laches of attorney.

(a) Two arbitrators were appointed; and by the terms of the submission, before they proceeded to business, they were to appoint an umpire; they enlarged the time, and then appointed an umpire. Dallas, C. J., held, "going before the arbitrators with knowledge is a waiver." (*In re Hicks and Others*, 8 Taunt. 696).

Reference to two arbitrators, with power to appoint a third, and to enlarge the time for making the award, together, or with any two of them, the arbitrators enlarged the time before they appointed the third; held such appointment was not sufficiently in accordance with the terms of the submission to warrant an attachment. (*Read v. Dutton and Others*, 1 M. & W. 69).

(b) *Wilkinson v. Time*, 4 D. P. C. 38, in this case he made the order.

Taylor and Another, assignees v. Gregory, 2 B. & Adol. 774. Award, 3000*l.*, subject to reference, arbitrator accidentally omitted to enlarge his time, a rule was obtained to show cause why a verdict should not be entered for the plaintiff, unless defendant would consent to the enlargement of time, and for costs of this application; the defendant's attorney would consent to the enlargement only on certain terms; the Court made the rule absolute, but ordered proceedings for fixing bail to stay until a time named.

(c) *Hall v. Phillips*, 9 Bing. 90.

By laches of attorney.

the neglect of the attorney of the plaintiff, the Court refused to interfere, and said the plaintiff must take his cause down to trial again (a).

Enlargement of time by effect of statute.

By the statute of the 3 & 4 of Wm. 4, c. 42, s. 39, the Court, are empowered to enlarge the time for making an award. Lord Denman, C. J., in *Salkeld and Another v. Slater and Another*, assignees, said, "the application of which is not to arbitrators under particular circumstances, but generally (b)," and Parke, B., in *Burley v. Stephen and Wife* (c), said, "the power given to the Court or Judge to enlarge the time applies to all cases." In *Lambert and Wife and Others v. M. Hutchinson, Administratrix* (g), Tindal, C. J., said, "I doubt whether the statute empowers the Court or a Judge to interfere when the arbitrator has power to enlarge the time, but who has inadvertently permitted the time to expire without enlarging it," the refusal of the rule was upon other grounds, but his Lordship concluded by saying, "I have a strong opinion upon the statute, but upon that point it is unnecessary to give any opinion." In *Doe dem. Jones and Wife v. Powell* (e), Patteson, J., said, "the Court from time to time may enlarge the period for an arbitrator to make his award, that means rather that the Court may enlarge the time where no power is given to the arbitrator to do so. If there is such a power, it is for him to do it, but I doubt if the Court would do it in a case where the parties or the arbitrator will not consent to proceed with the reference." In *Parbury v. Newnham* (f), which was a case wherein the time had expired without the arbitrators

(a) *Doe dem. Fisher v. Saunders*, 3 B. & Ald. 783.

(b) 12 Ad. & E. 770.

(c) *Supra*, p. .

(d) 2 M. & G. 860.

(e) 7 D. P. C. 540.

(f) 7 M. & W. 382.

having enlarged it in accordance with a power which the submission contained. Lord Abinger, C. B., in delivering the judgment of the Court, said, "the Court have power under the act to enlarge the time for making the award." ^{Enlargement by 3 & 4 W. 4.}

As to what cases, under the 3 & 4 Wm. 4, c. 42, s. 39, the authority of the Court, to enlarge the time, extends, and wherein the Judges shall exercise the power they thereby derive, are somewhat conflicting, as will be seen from the cases cited, and but for those decisions, it would be most particularly necessary to discuss the meaning the Legislature had in view, when the enactment was made, and which from the construction of the clause, is a matter fairly open to a doubt. Mr. Watson (a) says, "It is apprehended to be doubtful, whether this clause gives the Court, or a Judge, power to enlarge the time for making the award; in every case where the reference is by rule of Court, or a Judge's order, or where the agreement provides the submission may be made a rule of Court, or gives that power only in those cases where one party has revoked the submission, and the arbitrator proceeds *ex parte*, it is to be observed that the words of the statute are capable of being construed in either way." These observations of Mr. Watson, and the decisions above, appear to be all that the books contain upon the point.

All (b) seem to agree that the Court has power to enlarge the time in other cases than those wherein the submission has been revoked. It will therefore be necessary, not only to discuss the decisions above cited, but also the words of the statute, and the principle which governs references to arbitration.

There appears to be an essential difference between the dicta of Lord Denman, C. J., in *Salkeld and Another v.*

(a) Watson on Awards, p. 118.

(b) *Supra*, p. 82.

Enlargement
by 3 & 4 W. 4.

Slater (a), of Parke, B., in *Burley v. Stevens*, the judgment of the Court of Exchequer, in the case of *Newhan v. Parbury*, and the judgment of Mr. Justice Patteson, in *Doe dem. Jones v. Powell*, and the dictum, if it be only such, of Tindal, C. J., in the case of *Lambert v. Hutchinson*.

It is with the greatest deference that an observation is offered in the teeth of the decisions above, and had they been consistent, however they might have differed from the principle upon which it is presumed the law of awards is founded, the Author perhaps might have deemed the united opinions of the eminent persons above enumerated as conclusive of the matter, and any remarks or suggestions of his to be superfluous, but when they are not agreed, and it is remembered that in the arguments of counsel not one word was said about the principle which governs arbitrations, but the discussions were altogether confined to the meaning of the very doubtful phraseology of the section, it is on these considerations, the Author ventures to discuss the matter.

The first step, therefore, must be to ascertain the meaning of the words of the section in question, which may be gathered from its commencement, viz., to effectuate the intention of parties submitting their differences to arbitration, and also to prevent an improper revocation of a submission which contains an agreement that it shall be made a rule of Court, or, that is already so; for, before this statute, the revocation of submissions, which were not actually made rules of Court, was a serious and crying evil, and which not only entailed great inconvenience and expense upon the parties, but was oftentimes the cause of much injustice, by the delay which ensued; to remedy which, alone was a sufficient inducement for the interference of the Legislature.

The clause (b), stripped of its technical phraseology,

(a) *Supra*, p. 82. (b) See section of statute at length, *supra*, p. 6.

would, it is conceived, not only in accordance with the apparent intention of the Legislature, but in consonance with its strict grammatical construction, run as follows:—

Enlargement
by 3 & 4 W. 4.

Where a submission contains an agreement that it shall be made a rule of Court, it shall not, without the permission of the Court, &c., be revoked by either party, and the arbitrator, &c., notwithstanding such revocation, shall proceed with the reference, and the Court (to carry out the original intention of the agreement of reference,) will enlarge the time.

The words used must mean something, and the whole clause appears to be one enactment; but if the construction put upon the words is the true one (*a*), the latter part of the clause must be a substantive enactment, and if so, how is it possible to connect it with the prior part of the section, rejecting all the intervening words; and which must be done, to arrive at the conclusion above: “any such arbitrator,” the word “such,” is held to apply to the arbitrator mentioned in the preceding part of the clause, or rather in the first clause. By reference to the statute, it will be seen, that that part of the clause only particularises what arbitrations the act is intended to embrace, *viz.*, those wherein the parties, by using the proper words, have placed their matters under the cognizance of the Court: the section, after ascertaining the description of submission to which the act should apply, continues, that such submissions shall not be revoked, without the permission of the Court, or a Judge, and then follows the power to enlarge the time, which would seem to be intended to remedy the evil above spoken of, and to prevent the inconvenience which would be occasioned thereby, if the revocation occurred in the Vacation; or from a supposition, on the part of the arbitrator, that by such act he was deprived of all power, and therefore neglected to enlarge the time. In these cases, and these only, it would seem, the

(a) *Supra*, p. 82.

Enlargement by 3 & 4 W. 4. Courts have authority to continue the power of the arbitrator, for the very gist of the clause is to prevent improper revocations.

It has never been contended, that the act can apply in any other cases than those where the submission is made a rule of Court, or contains a power that it shall be so. And yet, if the clause be a substantive one, the word "such arbitrator" might be said to apply as well to any arbitrator as to any particular arbitrator, but, it is presumed, if such a construction was contended for, it would be deemed an absurdity, yet it is impossible to understand how the position laid down can be maintained, unless the latter part of the clause is connected with the prior part, and the words intervening rejected as a surplusage; if the section is one clause only, it must, it is conceived, be read as one; if two, then the meaning of "such arbitrator" is difficult to be understood.

It will be conceded, that "any such arbitrator can," must be connected with the arbitrator appointed as above, and if so, the words which follow must be introduced, for there can be no reason for using a certain part of the words and rejecting the others, and from which it would appear that the words apply not to such arbitrator only who is appointed, &c., but whose appointment had been revoked; such, it would seem, was originally the opinion of Mr. Baron Parke, as expressed by him, when application was made for the rule nisi, in the case of *Potter v. Newman*, but which opinion, when the rule absolute came to be considered, he intimated he had changed, but therein the Court gave no decision, the parties having agreed again to refer; but in the later case, of *Parbury v. Newnham*, the Court of Exchequer expressly decided, that it had power to interfere in other cases also, and such, from the dictum of Lord Denman's, in the matter of *Salkeld and Slater*, would appear to be his opinion, and the opinion of the other Judges, from the cases cited above.

From the dictum of Tindal, C. J., and the judgment of Patteson, J. (*a*), it would appear a distinction, is drawn between cases wherein the arbitrator has power, by the terms of the submission, to enlarge the time but which he has intentionally or inadvertently allowed to run out, and where the submission contains no power of enlargement; in the latter case, the opinion seems to be uniform.

A submission to arbitration, arises from the expressed wishes of the parties, and which is set forth in the agreement to refer. It is by virtue thereof, that the Courts of law, have power to interfere with the submission, and as the purpose of such agreement is the settlement of all matters of dispute between the parties, whether equitable or legal, or an admixture of both, and which, as the Courts of Common Law would not entertain therein, in accordance with the wishes of the parties, they allowed these private tribunals, to trespass upon their jurisdiction, and, as far as possible aided the parties in the furtherance of their common object, in entering into the submission.

After a while the Legislature stepped in, not for the purpose of compelling persons to refer their causes of difference to their fellows—not to enact and to enforce new and compulsory conditions, but to give effect to the voluntary arrangements of the parties, and to guard against (when entered into in a manner as directed by the statutes) the dishonesty or ill faith of either.

Interference of
the Legisla-
ture, reasons
for.

Before arguing the particular point in question, it was deemed well so far to digress, that the intention of the parties in referring might be borne in mind, and which intention (as above expressed) must be admitted.

If the courts of law have power to interfere in any other case than that seemingly pointed out by the statute (*viz.*

(a) *Supra*, p. 84.

Enlargement
of time by
3 & 4 Wm. 4.
Agreement,
construction
of

enlarging the time upon a revocation), it is conceived to be, with all submission, difficult to understand whence it can be derived. The submission, in all cases, is the agreement of the parties concerned, and, as in the case of any other agreement, should be construed according to the expressed and apparent intention of the parties. If they wished the arbitrator should have a longer time wherein to make his award, it would be easy to insert an enabling power for him to enlarge the time, but it might be, the very reason for entering into the submission was that the matter should be concluded by the time stated, if not, then, that the complainant should be enabled to resort to his remedy at law; for, if a power of enlargement was given to the arbitrators, they might delay the termination of the matter for an inconvenient time, to the great detriment of one or both of the parties. In such a case, why should it be said by the Legislature, we understand your intention of entering into this reference better than you do—that you have entered into the reference, and now you shall go on with it, and therefore, *nolens volens*, we will enlarge the time? Such *are* not, it is true, the words of the act, but it would seem the spirit of the interpretation.

Statute, con-
struction of.

It may be said that if the Court has not the power to enlarge the time, that great inconvenience and injustice might occur. It is true, it might be so, but shall a possible grievance vacate a great principle? for whilst our medium for the communication of ideas is imperfect (*viz.* language) it is impossible to provide for every case, and it surely must be a lesser evil to work an occasional and unintentional hardship, than a direct and positive injustice. If the intention had been that, *in all cases the Court* should have power to enlarge the time, the words of the act would then have been, *and in all cases wherein, &c.*, which words would be as few and simple, but more obvious, than those used, even if construed with the

context, and would have required but little undeasstanding ^{Enlargement} of time by 3 & 4 Wm. 4. to fathom them. If the words used can be construed in a plain and obvious sense, it seems strange that a departure should be had from that meaning, merely, as it would appear, to introduce an astuteness of construction.

If a reference was a public matter, and affected the interests ^{Reasons} of the community generally, it is easy to conceive that the interference of the Legislature would be highly proper and necessary, and that any ambiguity of words should be construed in accordance with those principles of justice, from which the greatest benefit would result, for the general interest of the community is paramount to individual benefit; but, in a matter which is strictly private, and which only affects the interests of those concerned, upon what principle shall it be said the Legislature shall act? ^{against the construction.}

A submission to arbitration, is a voluntary, and not com- ^{Submission to} pulsory act, and is in aid of, not of the Courts of law; if so, ^{arbitration,} why should the parties be coerced and compelled to travel out of their agreement, which it is conceived they are if either is, against his will, obliged to lengthen the time limited by the submission. ^{what.}

The concluding observation of Mr. Justice Patteson would seem to imply, that the Court would only interfere to enlarge the time, when the parties themselves assent to the Court exercising such powers; for, he says, he doubts whether the Court or Judge would do it where the parties or the arbitrator refuse to proceed with the reference; which, but for the preceding words, would seem to be exactly the position here contended for, but then it must be remembered, that the interference of the Court would be unnecessary, if the parties themselves assented to the enlargement of the time, (no power being given by the submission, and within the time originally limited,) for that would constitute a new submission by parol (oral), which

Submission to
arbitration,
what.

would be incorporated into the prior one. It is presumed his Lordship's observation applies to the power the Court has to enlarge the time in those cases wherein that limited has absolutely passed away ; for it is doubtful whether, in such a case, the assent of the parties would be incorporated with the prior submission, for that is lapsed and gone, though if the submission contained a power to enlarge, we have seen, from the conduct of the parties, the Court will presume a proper enlargement was made (*a*). If the submission was merely an oral one (either could revoke at any time, before the award was made), but it would require at least the power of the Court, or a Judge, to give it the effect of a written submission ; and, from the observations of Lord Eldon (*b*), it be fairly doubted whether the Court, in any case, could do so. The case in question was one where the time was intentionally allowed to expire, and his Lordship refused to interfere, and discharged the rule with costs.

The reason for the interference of the Court, would appear to have more force in a case where the parties give the arbitrators power to enlarge the time for making their award, for their expressed and apparent intention is that an award shall be made, and therefore there would seem but little, if any, hardship or injustice in the Court enlarging the time upon an accidental omission of the arbitrator to do so, for thereby it but furthers the intention of the parties when they first consented to refer ; for, by the exercise of such a power, as in the case of a revocation as mentioned above, they prevent, or rather remedy, ill faith.

It is with the greatest deference and submission that these arguments are advanced, but when it is recollected that it was only after much oscillation of opinion finally

(*a*) *Supra*, p. 9, *in notis*.

(*c*) *Supra*, p. 12.

decided that there was no difference between a legal ^{Submission to arbitration, what.} and a non-legal arbitrator (*a*), and that the umpire must be appointed by an act of the judgments of the arbitrators (*b*), and also that the conduct of the parties gave an implied assent to an irregular act of the arbitrators (*c*), and that any new point of law is only settled by a laborious investigation, it is trusted these recollections may weigh somewhat in the nature of an excuse for the Author, if he be wrong, but it does seem that the very principle of a submission to arbitration is, that it should be the voluntary act of the parties; if so, how shall it be said that, that intention is carried out, if an act of Parliament is allowed to constrain the parties beyond their expressed intentions? No other statute, or clause of a statute, (in relation to this subject), but this constrains or impinges upon the free will of the parties, but marches with the very spirit of the principle as above laid down, and which principle would forcibly apply, if the construction of this clause as here contended for, was carried out—viz. the prevention of a fraudulent withdrawing of either party, by revoking the power of the arbitrator when the circumstances appear less favourable than was expected.

Why should this clause be an exception to the general rule? and why should it be construed to be a compulsory, instead of a protective clause? Why should a departure from principle be had in this particular matter? Why should not this act be construed with the other, (*d*) as an enabling power, and be kept within the spirit of its expressed intention?—viz. to effectuate the intention of the parties.

Where the time is enlarged, the submission being under seal, and by an agreement not under seal, the time was ^{Enlargement of time, deed under seal.}

(a) *Supra*, p. 57, *et seq.*

(b) *Infra*. p. 108, *et seq.*

(c) *Supra*, p. 9, *et infra* *Waiver*.

(d) 9 & 10 Wm. 3, *supra*.

Enlargement
of time, deed
under seal.

extended, it was argued that the intention of the enlargement was to vary the defeasance only, and the legal effect was to continue the bond in force, subject to the second defeasance, with this the Court held, and that an action for the penalty and for the non-performance of the agreement could

Enlargement
of the time
according to a
power consi-
dered in a sub-
mission, effect.

be maintained (a). Where the agreement contains a power to enlarge the time for making the award, and an enlargement is made, it must be understood, virtually, to incorporate within itself all the antecedent agreements between the parties, relative to the subject, as if the same had been formally set forth, and of course among the rest that the submission to arbitration should be made a rule of Court, and that with reference to the enlarged time instead of that originally specified in the bond (b).

Certificate in
lieu of award.

In some cases the parties, on referring their cause, agree not that the arbitrator shall make an award, but shall certify. Between a certificate and an award there is no distinction (c), the certificate is for the purpose of saving the expense of an award stamp, and is governed by the rules which regulate awards, as if the arbitrator makes a mistake (d), or the submission contains no fixed time for making the award (e).

(a) Greig v. Talbot, 2 B. & C. 182, Bayley, J.

(b) Ellenborough, C. J., Evans v. Thompson, 5 East, 191, overruling Jenkins v. Law, 8 T. R. 88. Rule absolute for attachment.

(c) Price v. Price, 9 Dowl. P. C. 334. To set aside a certificate, the arbitrator had clearly committed a mistake in the conclusion he had drawn from documents which had been presented to him, it was contended a certificate differed from an award. "The arbitrator is the Judge chosen by the parties, they must abide by his decision, though he has made a mistake, there is no distinction between certificate and award." Williams, J. (335).

(d) Price v. Price, *supra*.

(e) Salter v. Yeates, 5 Dowl. P. C. 291. The action was for work and labour, the cause was referred, the arbitrator was to certify the

The rule to set aside a certificate must be obtained in the same way, and the proceedings are the same as in the case of an award, it must state the grounds of the application (a). Rule to set aside certificate.

Submissions, when the reference is at *Nisi Prius*, often contain a clause, that the arbitrator shall have the like power to certify as a Judge has, in event of the damages being reduced below 20*l.*, and in such cases he is bound to follow the statute, and the certificate must be given at the time of making his award (b); and where the submission contained Certificate for costs, sufficiency of.

value of work done, which he did. It was objected that the certificate was bad, because he did not certify within the time limited by the return of the jury process. It was held, such could not have been the intention of the parties, being returnable on the next day: where there is no time named, an arbitrator may make his award at any time, and there is no difference whether a reference is by order of *nisi prius* or not, a certificate is to save the expense of an award stamp.

James v Hawkes, 10 Ad. & E. Reference at *nisi prius*, verdict for the plaintiff, subject to a reference to hear evidence and give certificate, but no order of *nisi prius* was drawn up, or rule obtained; referee heard the evidence the same day, but no certificate was given until after the assizes, when the referee certified a verdict should be entered for the plaintiff, which was done. "In no case is the same jury ever called on to decide on the certificate; it is the consent of the parties alone that can supersede the finding of the jury, and thereby the finding of the certificate is the finding of the jury." Lord Denman, C. J. (33). "This is a motion to set aside a verdict under disguise." Coleridge, J.

(a) *Carmichael v. Honchen*, 2 Nev. & Man. 203. Verdict, subject to a reference to a surveyor, who was to certify what should be paid, to be delivered on a day named, with power to enlarge the time, the rule requiring the grounds of objection to be set out in rules *nisi* applies here. It is in substance an award." Lord Denman, C. J. (204).

(b) *Spain v. Cardell*, 9 D. P. C. 745. Reference of two actions, one of trespass, *q. c. f.*, the other for diverting a water-course; the verdict was taken by consent, subject to a reference, and the arbitrator had power to certify; he directed a verdict in both actions should be entered for the plaintiff, and assessed the damages at 1*s.*, and certified the action was brought to try a right. On taxation it was objected that the certificate was insufficient. On application to Court. Held, the parties are concluded by their own agreement, on which we

Reference back
to the arbit-
rator.

a clause that in event of the effect or meaning of the award not being understood, that the Court should have power to refer it back, and which also gave the arbitrator power to certify, &c.; if he did not certify it was held to be no reason for referring the matter back for his reconsideration (a), and so in a later case, wherein the Master, to whom the matter was referred, expressed an opinion, but did not give a certificate, that the matter was proper, &c., the Court held as above. Parke, B., said, "the proper course was to apply to the Judge before whom the cause came on for trial, and lay before him the certificate of the arbitrator, and that he could then exercise his discretion" (b). A Judge at Nisi Prius

must put a reasonable construction, they have given the arbitrator the same authority which a Judge at nisi prius possesses, and when the arbitrator has such power given him, he must in all cases follow the directions of the statute. The certificate must be given at the time of making the award. Alderson, J. (749).

(a) *Bury v. Dunn*, 1 D. & L. 141. To refer back, to certify the action was brought to try a right, the submission contained a clause that the arbitrator was to have the same power as a Judge at nisi prius, that in the event of a dispute in the meaning or effect of the award, that it should be referred back to the arbitrator to be reconsidered; the award was for plaintiff on every issue, (the damages were assessed at a farthing,) and regulated the future enjoyment of the water, but contained no direction as to costs; application was made by the arbitrator to certify, and he refused, it was imagined that the opinion of the Court might induce him to alter his opinion. "I am of opinion I ought not to interfere, I ought only to send back the cause to the arbitrator under such circumstances, as the Court would have granted a new trial for want of the certificate." Coleridge, J. (143), rule discharged.

(b) *Webber v. Lee*, 1 D. & L. 584. Action by an attorney for costs, pleas, general issue and payment, cause was referred to the Master, with a clause to enable the Court to refer it back to him, or such other person as they should please; he found less than 20*l.* was due, and expressed an opinion it was proper, &c., but gave no certificate. Held, "the Court had no power to refer it back to the Master, unless the award was bad," Lord Abinger, C. B. (285). "Application should

may certify at any time (a), and in event of the submission not empowering the arbitrator to certify, the Judge before whom it should have been tried may certify, if the cause was referred at Nisi Prius, as did Tindal, C. J., in the case of *Boggref v. Hawke* (b), and Patteson, J., in the case of *Nokes v. Frazer* (c), wherein it was contended that the Judge had no power to make his certificate, unless he had heard the whole cause himself. His Lordship held, "that the meaning of the words, trial before a Judge at Nisi Prius in one of the superior Courts or Judge of Assize," was in case of a cause being brought on for trial: and that it was not necessary it should be entirely tried before him, for as the cause went on he might be able to perceive that the cause was a proper one to be tried before him, though it might afterwards be referred to some other person to certify for what amount the verdict of the jury should be ultimately entered" (d). Where the submission contains no power for

Power of a Judge at nisi prius to certify.

Meaning of the statute.

be to the Judge before whom the cause came for trial, and he will exercise his discretion." Parke, J. (The rule was to refer to enable the Master to grant a certificate).

(a) *Ivey v. Young*, 5 D. P. C. 450.

(b) 6 D. P. C. 67.

(c) 3 D. P. C. 339.

(d) He also said, "if the whole matter had been referred to an arbitrator it might have been more difficult to decide, that the Judge could give such a certificate, though I do not say that he might not even then certify."

The arbitrator is a Judge of the parties' own choosing, and is not a Judge within the meaning of the statute, and it would seem at least doubtful, whether a Judge could adopt the opinion of the arbitrator upon his having given an opinion, however unauthorized, or in the event of his not so having given an opinion, that he could draw his conclusions from the conclusion of the arbitrator, as expressed in his award. If the cause was called on and only partly heard, the reason as given in the text would appear conclusive, but it is difficult to understand how it could apply to a case of which until he sees the arbitrator's award, the Judge is in utter ignorance of the merits, and even then it may be that the arbitrator's

Special jury.

the arbitrator to certify, and the Judge who referred the cause dies, the Court will not interfere (a). As to the power of the arbitrator's certificate for the costs of the special jury (b).

Excess of authority, award when bad.

Where the arbitrator exceeds his authority, such excess, if it be a matter which cannot be rejected as a surplussage, vitiates the award, as where it is so incorporated with the other part of the award as not to be capable of severance, as where the title to land was submitted the arbitrator directed the plaintiff to take the title, and that the defendant should give a bond of indemnity (c). Where the arbitrator

Bond of indemnity.

decision was drawn from wrong premises, and yet the face of the award show no defect; but then on the other hand, it must be considered that a certificate differs from an award in this particular. An award is an exclusive jurisdiction. A certificate is an extension of the time of the Court, though governed by the same rules as an award. (*Supra*, p. 92).

(a) *Astley, Bart v. Joy*, 9 Ad. & El. 702. Actions for balance of rent, the cause was partly heard, verdict for defendant, subject to a reference to certify the amount of the damages; the arbitrator also certified for a less sum than 20*l.*, and at the request of the plaintiff's agent, that it was a proper cause to be tried by a Judge, the plaintiff endeavoured to obtain a like certificate from the Judge, who referred the cause, but who was too ill to give it, and died. Motion was to direct a certificate be entered on the *postea*. "Did the order of reference give arbitrator power to certify. There is no warrant for this application." Lord Denman, C. J. "We have nothing to proceed on but the arbitrator's opinion." Littledale, J., rule refused.

(b) *Infra*. See *Costs*

(c) *Ross v. Boards*, 3 Nev. & P. 382. Reference of action of trespass, and all matters in difference between the parties, and all questions on any agreement the arbitrator awarded that the defendant should convey and give a bond of indemnity to the plaintiff in event of his eviction. "The arbitrator says in effect—take the title with all its faults, and awards a bond of indenture, the award is not final." Lord Denman, C. J. (384). "By directing a conveyance it in effect decided the title was good but a bond of indenture is beyond the submission." Littledale, J. (8 Ad. & El. 295, S. C.)

directs that the costs shall be taxed as between attorney and client (a). So where the arbitrator awards payment of a gross sum due in two distinct rights, to be paid as if no distinction existed (b). So where he directs an illegal act to be done, as putting up a stile and foot bridge on another person's land, without specifying that such person's assent shall be first obtained (c). Directing a compensation to be given to a person not a party to the submission, is bad (d):

Gross sum due on distinct rights.
Illegal act.
Compensation to a person not a party to submission.

(a) Award that plaintiff should pay defendant a certain sum towards his costs, and that the defendant should pay the whole costs, to be taxed as between attorney and client; "Held such an exception as to vitiate the award, for such award is so intimately connected with the other parts, as not to be severed." (*Seckham v. Babb*, 8 D. P. C. 168, Parke, B.; *Seecomb v. Babb*, 6 M. & W. 129, S. C., *et vide Costs, infra*).

(b) Two actions were brought against the executors for certain work done in their time, and in time of the testator, the award was, that the prior action should cease, and the arbitrator found a sum due on the latter. Some part of the work was done after the testator's death, and the arbitrator, to enable the defendant to set aside the award, stated, the construction he put upon the order was, that if any thing was due, whether subject of second action or not, the verdict was to stand. "Held bad, there were two actions, one in the defendants' own right, and one in right of their testator; it was proved that work was done, both before and after the death of the testator, but the plaintiff could not distinguish the work which was done at the separate times, the arbitrator combined the two sums, giving the whole against the defendants, thereby making them pay the debt of the heir. The statement was made with a knowledge of the purpose intended to be made of it, and in such case it is immaterial (for the purpose of receiving evidence of it) whether the arbitrator gives this out in the course of the proceedings, or after the award." (*Jones v. Corry and Others, Executors*, 5 Bing. N. C. 191, Tindal, C. J. "It is in effect a mistake of the arbitrator as to the extent of his jurisdiction." *Vaughan, J.*)

(c) Parke, B., *Turner v. Swanston*, clerk, 1 M. & Wels. 572.

(d) "An award directing that compensation, &c. to the plaintiff, or to him and some other person, is bad." (*Fisher v. Pimbley*, 11 East, 192, *Ellenborough, C. J.* "Such an award cannot be maintained, it being of matters not submitted, the submission was of matters in

Finding more than submitted.	so a direction as to fixtures where repairs were the subject of the submission (a): so where a right of way was submitted, as a bridle and foot way, finding foot, horse, and carriage way (b): so directing a lease to be executed for a period larger than the terms of an agreement (c): so reserving to
Reservation of power over a judicial act.	himself (arbitrator) a power to do a judicial act after the award is complete (d), but not if the matter could be severed (e), but a direction to pay the costs on a certain day, he having no power over them is a simple excess, and does not vitiate the award (f).
Mode of proceeding for excess.	When an arbitrator exceeds his authority, the motion should be to set aside the award: the payment of the money awarded does not make any difference, or prevent the motion being made (g).
Payment of money awarded.	

difference only between plaintiff and defendant, the award is of matters in difference between plaintiff, defendant, and others." *Le Blanc, J.* "Plea of no award means no award according to the submission." *Bayley, J.* 193. (*Cayhill v. Fitzgerald*, 1 Wils. 28, S. P.)

(a) "Covenant against landlord for non-repair, referred, and all matters in difference; arbitrator, amongst other things, directed a payment in respect of grates. The arbitrator had no authority to direct what should be done as to the fixtures, and if he had, he has given his directions in too incorrect a manner." (*Price v. Popkins*, 10 Ad. & El. 144. *Denman, C. J.*)

(b) *Hooper, Sen. v. Hooper, Jun.*

(c) Arbitrator awarded that A. should execute a lease for a period commencing from payment of rent, and the agreement recited the lease was to commence from possession three years prior. (*Bonner v. Liddle and Others*, 1 Brod. & Bing. 80. *Dallas, C. J.*)

(d) *Supra.*

(e) *Manser v. Heaven and Another, supra.*

(f) The costs were to abide the award, the arbitrator ordered them to be paid on a particular day, at a particular place; held, the direction by an arbitrator to receive costs on a certain day does not take away the right to them sooner if the defendant is entitled to them earlier, and the only effect will be, if not paid by the plaintiff on the day named, they must be deducted, and motion for an attachment for the balance. (*Cockburn and Another v. Newton*, 2 Man. & G. 905, *Tindal, J.*)

(g) *Bartle v. Musgrave*, 1 Dowl. N. S. 326, *Patteson, J.*

Formerly it was a subject much in discussion, whether an arbitrator was entitled to charge for his attention to the matter submitted, but which question is now finally settled (a). Costs of an arbitrator.

It was the custom of the Courts, when no sum was fixed, if the submission was by rule of Court, to refer the matter to the Master, to ascertain what was a proper sum to be paid; so also if he named his fee, the Court would refer it to the Master to ascertain if it was a sum to be charged (*i. e.* not excessive) (b). Custom when no arbitrator's fee is named.

Where the arbitrator's fee had been paid, and the application to the Court was, that the arbitrator should refund, Tindal, C. J., said, "no instance has been found where such or any order, as that now sought has been made against an arbitrator, and we think we should not by any principle of law, or the practice which has prevailed, be warranted in making the rule absolute against the arbitrators" (c); a similar application was made in a case where the award had been made eight years, and the attorney to the plaintiff was dead; Tindal, C. J., said, "that after such a lapse of time they could not think of interfering, or directing an inquiry" (d). Application for the arbitrator to refund.

(a) *Infra*, p. 100.

(b) An arbitrator fixed the amount of his fee and the prothonotary, seeing the sum fixed, thought he had no authority to inquire into the reasonableness of the amount. "It cannot be in the power of the arbitrator to fix the amount of his own remuneration without control, it would be making him a judge in his own cause, we do not go into the reasonableness of the charge, but object to the principle that it is not examinable." (*Fitzgerald and Another v. Graves*, 5 Taunt. 343, Heath, J.; *Musselbrook v. Dunkin*, 9 Bing. 605; *Brazier v. Bryant*, 3 Moore & Scott, 844; *Prosser v. Young*, 3 Taunt. 461.)

(c) *Dosset v. Gingell, Administrator*, 2 M. & G. 875. In this case one of the arbitrators attended before the Master on taxation to explain, and the endeavour was to compel the return of the costs not allowed. Action might lie in assumpsit to recover excess, (note (e), *ibid.* 872.)

(d) *Brazier v. Bryant*, 2 D. P. C. 757.

Payment of costs by one of the parties.

Direction to pay costs in equal moieties.

Payment of the costs of an arbitrator to two arbitrators only effectual.

Where one of the parties paid the costs of the award, which were proved to be reasonable, the Court held the arbitrator might demand compensation for his trouble, so the party paying may call upon the other for contribution (a). Where the direction was that the charges should be paid in equal moieties, but which were paid by one of the parties, the Court granted an attachment against the other for having refused to contribute his share (b). Where the reference was to three, with power for any two to make the award, which was made by two, the other refusing to join, one of the parties took up the award, and paid the fees of the two making it: on application to the Court by the third arbitrator for his costs, the Court refused to interfere, saying, if the money has been improperly divided, that was a matter between themselves, and he who got nothing, if so advised, may bring an action for his share, his only remedy being against his fellow arbitrators (c). In *Viramy v. Warne* (d), Lord Kenyon, C. J., said, "that an arbitrator could not recover unless he could prove an express promise, but which matter it is apprehended is finally set at rest by the case of *Hoggins, Leary, and Bagshaw, v. Gordon and Others*, where it was decided that where the arbitrators aver a promise, the making the award is a sufficient consideration to support it, and the Court gave judgment for the plaintiffs (e), and which decision would appear to be

(a) *Swinford v. Burn*, 1 Gow, 5, *et vide supra*, *Attachment*.

(b) *Hicks v. Richardson*, 1 Bos. & Pul. 93.

(c) *Burmoughs v. Clarke*, 1 D. P. C. 51, Taunton, J. Rule nisi was to compel the plaintiff to pay him his costs.

(d) 4 Esp. 47.

(e) The order of reference named two arbitrators and empowered them to nominate a third as umpire, they nominated the third plaintiff and averred that the defendants had notice, and made their promise to all to pay them fair and reasonable costs, in consideration,

in accordance with every principle of law and reason, for the duty of an arbitrator is of a nature different to that of a barrister, and one which may be borne by any indifferent person, and of any order of society.

Payment of the costs of an arbitration to two arbitrators only sufficient.

The partiality or misconduct of an arbitrator is a ground for setting aside his award, but to induce the Court to grant leave to revoke the submission, very strong grounds must be shown (a).

Partiality and misconduct of an arbitrator.

In a case before the statute of Wm. 4, Best, C. J., held that the plaintiff committed no impropriety in revoking a submission which had been made a rule of Court, where the arbitrator acted with partiality (b), and Lord Ellenborough held, though partiality was no plea in bar to an

&c. "Averment of joint performance and award by all that they pay all is a joint contract; where there is an express promise an action for the costs can be maintained,—and in this case it was held, the arbitrators and the umpire could join and recover: the question came on, on demurrer." (3 Q. B. R. 474, Denman, C. J.; 1 Gow, 5, S. P.)

(a) *Supra*, James v. Attwood, 7 Scott, 841.

(b) *Stewart v. Williamson*, 2 Moore & P. 768. The submission was made a rule of Court, the arbitrators and umpire were appointed: they met, and intimated that the plaintiff was not entitled to recover anything, whereupon plaintiff's attorney procured a deed of revocation signed by the plaintiff, after which the defendant's arbitrator and the umpire made an award in favour of the defendant, notwithstanding the award, the plaintiff entered an action and recovered 1500*l.*, and sued out an execution, and defendant commenced an action on the arbitration bond, and made an affidavit that he could not serve plaintiff. "The umpire appointed, acted with partiality throughout, and therefore the plaintiff committed no impropriety by revoking: the umpire, to say the least, was influenced by the defendant, he having employed him: it is said the remedy should be application to set aside the award, if obtained by undue means or the arbitrators acted improperly; I do not think the plaintiff should be deprived of his power to revoke their authority—the circumstances disclosed would be a good answer to the bond."

action on a bond conditioned, &c., yet it might be made a plea to the equitable jurisdiction of the Court (a).

Knowledge of improper conduct and not making it known.

Where one of the parties has a knowledge of an alleged misconduct of an arbitrator, he cannot move to set aside the award on that ground, if he allowed the arbitrators to proceed after he had that knowledge. Tindal, C. J., said, "What right has he to lie by, and allow the arbitrators to make their award, and when unfavorable, to move to set it aside?" (b).

Award of an excessive sum.
Award of a sum smaller than damages sustained.

The award of an excessive sum is *prima facie* evidence of partiality (c). In a recent case where the arbitrator awarded 200*l.* as a proper sum to be paid for damages, the repair of which cost upwards of 1000*l.*, a Court of Equity refused to interfere, though it was alleged that a witness was heard to say that if the plaintiff did not give him 200*l.* he would spoil his cause; but it was not proved: the witness swore before the arbitrator that the work might be repaired for 200*l.*, and an allegation was, that he had been paid more

(a) Partiality and improper conduct in an arbitrator in making his award (without hearing the defendant and his witnesses) cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the equitable jurisdiction of the Court, nor could he plead a collateral agreement by parol, to invalidate a claim arising upon a deed. How could the injustice of an arbitrator be pleaded against one of the parties, without at least implicating him in the misconduct? Lord Ellenborough suggested a case should be laid before the Court upon affidavit, for discharging so much of the rule for making the submission to the award a rule of Court, as restrained the defendant from filing a bill in equity, which application was made. (*Braddick v. Thompson*, 8 East, 345, citing *Wilson v. McCormick*, 2 Wils. 148.)

(b) *Bignall v. Gale*, 2 M. & G. 830. The allegation was, that one of the arbitrators threatened, that if the defendant did not pay him 200*l.*, that the award should be unfavourable to him, but which the arbitrator denied by affidavit.

(c) Lord Mansfield, C. J., *Turner v. Rose*, 1 Lord Kenyon, 393, citing 3 Ch. Rep. 76.

than that sum for work he had done; the Court said they could but think that the arbitrator would not have awarded the smaller sum unless upon very sufficient and strong proof (a). The misconduct of the arbitrator must be made very manifest to the Court in these days to induce them set aside the award (b). The exclusion of a co-arbitrator from the meeting by force or fraud, or one of the parties; furnishes a sufficient presumption of corruption (c). So if the arbitrators take money of a party in whose favour the award was made, but before making it for their charges, the Court set it aside (d).

Award of a sum smaller than damages sustained.

It is said to be doubtful how far an arbitrator is punishable if he misconducts himself. In the case of *Chiquot v. La Quesne* (e), one arbitrator said "he should see and judge upon the plain facts," the other said "he should not mind the facts, being convinced that one had misused the other, and having it in his power he would mulct his representatives." In this case the Lord Chancellor decreed costs against him. And in a case where combination was proved, Lord Eldon made a like decree (f).

Punishment of an arbitrator for misconduct.

By these cases it would appear, that where an arbitrator misconducts himself, he can be made a party to a bill in equity, and have costs decreed against him, but a clear case of corruption must be made out against him, and unless there be, his name will be struck out of the bill, for the Courts are ever disposed to view the conduct of arbitrators in a favourable light (g).

(a) *Scales v. The East London Water Works*, 1 Hodges, 92.

(b) *Bedington v. Southal*, 4 Price, 235.

(c) 2 Vern. 514; *In re Hicks*, 8 Taunt. 694.

(d) *Shepherd v. Brand*, temp. Lord Hardwicke, 53.

(e) 2 Ves. 315.

(f) *Lord Lonsdale v. Littledale*, 2 Ves. Jun. 453.

(g) *Vide infra, Pleading*.

Liability of an arbitrator at common law for neglect, misconduct, or refusal to proceed.

Action for misconduct.

Arbitrator's trust, assimilation to a bailment.

Mr. Watson seems to doubt whether an action at common law will hold for the misconduct of an arbitrator (*a*), but when his valuable work on Awards was written, it was more than doubtful whether an arbitrator could recover his charges, but which the case of *Hoggins, Leary, and Bagshaw v. Gordon and Others* (*b*), places it beyond a doubt.

It seems probable that upon an assimilation to the principle of the law of bailments, an action could be maintained not only for such misconduct of an arbitrator as amounted to corruption, and whereby the award becomes void, and the parties are put to an expense, but also for refusal to proceed therewith. The action might not, perhaps, be maintainable for damages by way of penalty as a compensation for not proceeding with the reference, but, it is conceived, it might, for those expenses which the corruption occasioned, by defeating the intention of the parties, and, in case of a refusal, to proceed for those charges which have been incurred. If a man becomes bailee of goods, even without a fee, as in the case of *Coggs v. Barnard* (*c*), he is liable for neglect. So an arbitrator, though he does not become an actual depositary of goods, he accepts a trust, the acceptance of which would imply that he should fulfil it, and the entering thereto of the parties, and they being bound by his award would, it is conceived be a sufficient consideration to bind him, even supposing he has no power to make any charge, for by accepting a trust or office, a man is bound to perform the duties, but how much more forcibly will the reasoning apply when he accepts the trust; with the power of charging for his trouble: his character is thereby changed, and he becomes as it were a bailee for fee and reward, and the implication is that the parties

(*a*) Watson on Awards, p. 92.

(*b*) *Supra*, p. 100.

(*c*) Lord Raym. 909.

or a particular party, as the terms of the submission may be, will pay him so much as his services shall be worth, and if he has, as undoubtedly he has, power to charge for his trouble, the implication must be that he shall be accountable not only for gross misconduct, but even for want of common care and attention according to his knowledge.

Arbitrator's
trust, assimila-
tion to a bail-
ment.

By an examination of the principle it would seem that an arbitrator is liable even at common law for misconduct, or there would be no mutuality in the contract, for, if he can maintain an action for his charges, it seems a necessary consequence that he would be chargeable for neglect, or a refusal to execute the duty which he, by accepting the office of arbitrator, undertakes to perform, and it is apprehended that as an averment of a promise and the execution of the duty is a sufficient evidence of that promise so as to charge the parties to the submission with the costs of the arbitration; so an averment that he (the arbitrator) undertook the trust in consideration of his charges being paid would, it is submitted, be sufficient to charge him for negligence or misconduct whereby the submission is rendered void, and the intention of the parties defeated.

UMPIRE.

All the preceding matter relating to an arbitrator necessarily applies to an *umpire*, about whose office it will be necessary now to speak, viz., as to his appointment, power, and duty, (and wherein it varies from that of an arbitrator) over the subject matter of the submission.

Umpire, appointment of.

An umpire, as well as an arbitrator is considered as the Judge selected by the parties, and is, equally with the arbitrators, under the protection of the Court, and is either named by the parties or appointed by the arbitrators in accordance with a power contained in the submission.

It may be, that if the arbitrators do not agree that they shall stand to the umpirage of such an one, or if they do not agree, upon all matters, then for the residue (a). A submission to A. and B., and C. being an umpire, means he shall be umpire (b), and if it be that in the event of the disagreement of the arbitrators, their non-agreement shall be construed as a disagreement (c), though they never talk of the matter.

Refusal to act.

If the umpire elected refuses to act, they, (the arbitrators), may elect another umpire, unless his election be conditional;

Umpire, when to be appointed.

if he does accept it (d); and sometimes the condition is that they appoint an umpire before they proceed to inquire into the matters submitted, and which Lord Ellenborough, C. J., held to be a most convenient way for the arbitrators to

(a) Com. Dig. Arb. (F.)

(b) Ibid.

(c) *In re* Doddington and Bailward, 5 Bing. N. C. 593, S. P.

(d) Com. Dig. Arb. (F.)

begin, because they are more likely to agree then, than when they themselves quarrel(a), and if there be no express direction to the contrary, they may so appoint the umpire (b). Umpire, when to be appointed.

If an umpire be appointed, and he acts, his appointment cannot be avoided if it be once concurred in by the parties who have the power of appointment(c), and if he makes Umpire acting.

(a) *Harding v. Watts*, 15 East, 558; *Bates v. Cooke*, 9 B. & C. 407, S. P.

(b) *Ibid.*

(c) *Oliver v. Collings*, 11 East, 367. Rule absolute for an attachment for non-performance of award; *contra*, affidavit stated the reference to the arbitrators, who if they did not agree, were to appoint an umpire, they appointed A. who refused to act, they then appointed B., to whom the defendant objected, and on the arbitrator assenting, they each proposed a different person, on which the plaintiff's and the defendant's attorney met and agreed on another person (but no further appointment was made by the arbitrators), the plaintiff's attorney then called upon B. before the time was out to proceed with his umpirage, and an appointment of him was tendered, which one arbitrator signed and the other refused; notwithstanding which, B. made his award within the time, but after notice given him by the defendant's attorney that his appointment was objected to and agreed to be revoked; it was contended, under these circumstances, the Court would not by granting this attachment preclude the defendant from disputing the authority of the umpire by an action by the plaintiff on the submission bond (368). "If an authority be once executed, it cannot again be executed, and which it was by the appointment of an umpire, who accepted and acted on the authority conferred on him—the assent or dissent of the parties signifies nothing. The subsequent tender upon a stamp was merely to serve as a formal evidence of it. The arbitrator in compliance with the wishes of the defendant made an ineffectual attempt to appoint another in the place of him appointed before, but they could not agree, therefore the original appointment stood as before." (Lord Ellenborough, C. J., 369.)

Where a submission contained a power to appoint an umpire, on the disagreement of the arbitrators, they met and considered the matter, but could not agree when it was proposed further evidence should be produced upon the part of the defendant, and certain documents were produced, which one of the arbitrators refused to look at,

Umpire acting. his award within the time limited for the arbitrators to do so, they having disagreed, the award would be good (*a*), though the contrary was formerly held (*b*), nor is it necessary for the award to state that the arbitrators had disagreed (*c*).

Choice of umpire.

Sometimes the appointment of an umpire is a matter of difficulty, and various expedients have been resorted to, such as drawing lots, tossing up, &c. Where the arbitrators have each appointed a person, and were unable or unwilling to choose between them or forego their own choice, so that the means by which an umpire should be appointed was a matter of much difficulty; and perhaps a subject upon

and the umpire was applied to, by letter, to receive the further evidence; he met the arbitrators, but refused to proceed, unless they disagreed, which they did; they wrote down their opinions, *i. e.*, the points in difference they deemed essential, and gave notice of dissent, and appointed to meet the umpire; at the meeting, one of the arbitrators proposed to interfere, which the umpire refused to allow him to do, and the umpire made his award, within the time given for the arbitrators' decision. It was objected that the arbitrators had not finally disagreed, but Coleridge, J., said, "he had no doubt that the appointment of the umpire was valid." (*Ordcliff v. Walters and Another*, 2 Mood. & Rob. 232.

(*a*) *Smailes v. Wright*, 3 M. & S. 559. Submission was to two to make an award on a day named, if they did not, then the umpire was to do so; on a subsequent day, the arbitrators, before the day, disagreed, and declared that they did not intend making any award, within two days before the expiration of the arbitrators' authority, the umpire made his award. "If they finally disagreed, and determined their power, why should not the umpire proceed? no inconvenience could result, and it saved time; what has been done, was within the umpire's authority, and was defeasible only on the arbitrators making the award in due time." Lord Ellenborough, C. J. (561).

(*b*) In *Mitchell v. Harris*, 1 Ld. Raym. 671, it was said that the umpire could not make his award until the arbitrators' time had expired, but which doctrine may be said to be overruled by *Smailes v. Wright*, *ubi supra*.

(*c*) *Spriggens v. Nash*, 5 M. & S. 193.

which more than any other in the matter of awards, the opinions of various eminent Judges have conflicted; it was ultimately held that the selection of an umpire must be a matter of choice, and not of chance.

Where each arbitrator selected a person, and tossed up for choice, Lord Ellenborough held this was a selection from two fitting persons, and to which mode he saw no objection (*a*). In a later case where the names of four persons were written and put into a hat, on motion to set the award aside on the ground of an improper appointment of the umpire, Lord Tenterden, C. J., said, "We are of opinion that this mode of appointing an umpire is bad, the parties expect the concurring judgments of the two arbitrators in the appointment of the third, and laid it down as a broad rule that the appointment of a third person, must be the act, the will, and the judgment of the two, and must be a matter of choice, not of chance, unless the parties to the submission acquiesce in some other mode (*b*); and which rule of Lord Tenterden's is the law (*c*), with this qualification, if the parties know of all the circumstances of the appointment, and they consent, the appointment is good, though lots be drawn or other means are used to arrive at a choice, but if any circumstance of the appointment be kept back, it is void (*d*).

(*a*) *Neale v. Ledger*, 16 East, 51.

(*b*) *In re Carrel*, 9 B. & C. 624.

(*c*) *Ford v. Jones*, 3 B. & Adol. 248. Reference to two, and then to an umpire, in case of dispute; on dispute, each arbitrator named a person, neither was objected to; all persons concerned were present, and it was agreed to put the names into a hat, and the one drawn should be the umpire: he made the award; the defendant was dissatisfied, and a rule was obtained to upset the award, on the ground of improper choice. (*Ledger v. Neale*, said to be overruled, *quære*, (250), recognised by the Court.) "The appointment of an umpire must be a matter of choice, not chance." Lord Tenterden, C. J.

(*d*) *Jamieson v. Burns and Dean*, 4 Ad. & Ell. 945. Reference to

Appointment
of umpire, time
of.

The arbitrators may appoint an umpire, as well after the time directed for making their award, as before, unless they

two, of all matters in dispute, in the event of difference, to appoint an umpire between them; the umpire made his award, and the plaintiff obtained a rule nisi to shew cause why the award should, &c., because the umpire was not properly appointed, the choice being decided by chance. Each wrote two names, and each struck one off, and then tossed for choice; the plaintiff swore that he never assented to such a nomination of the umpire, and proceeded with the reference, without the knowledge of the manner in which he had been chosen; the attorney swore that he had never assented, but that he was bound by the appointment. *Contrà*, affidavit stated that the attorney was aware of the manner of the appointment, and never objected, but it did not appear that he knew that one of the arbitrators was objected to, and it was denied by affidavit that he had so objected. (946.) "The assent of the parties cures an irregularity, which consists in failing to pursue the precise terms of the reference." (*Per arguend.* Campb.) "If two persons named for umpires are equally fit, and there be no reason for preferring one to the other, it seems as if an application to chance, or some accidental circumstance, must decree the choice." Lord Denman, C. J. "It is certainly not desirable, that chance should ever be resorted to, such a proceeding is apt to lead to issues of fact upon affidavits." Lord Denman, C. J. (948.) "The facts were not all communicated." Littledale, J. "Without a knowledge of all the facts, it is no assent." Patteson, J. Rule absolute.

Greenwood v. J. and A. Tettersington, 9 Ad. & Ell. 699. Motion to set aside an award for an improper appointment. The arbitrators were to appoint an umpire; each named a person, and the choice was decided by ballot; the arbitrators informed the parties that they had mutually chosen an umpire, and the parties approved thereof, and the umpire made the award. "The presumption is against the election by lot: it must appear that each arbitrator exercised his judgment on the fitness of the person to be ballotted for, and that the parties knew of the course to be adopted; the parties were told of the appointment, but that, if implying, they exercised their judgments, might be a complete misrepresentation." Lord Denman, C. J. (700.) "Unless there be a clear consent, nomination by chance is wrong." Littledale, J. "Assent in ignorance is no assent." Coleridge, J. (701.)

In re Hodson and Drewry, 7 D. P. C. 569. Motion to set aside an award; the umpire was chosen by lot, the clerks only of the attorney were present, and none of the parties, but the arbitrators.

are restricted by the submission (a). If a submission directs Appointment of umpire, time that the award shall be made upon a certain day, and if it of. be not then made, that an umpire shall be appointed; if one of the arbitrators dies before that day, the umpire may make an award before the day named. So also if the arbitrators absolutely refuse to intermeddle (b).

An umpire is bound to examine the witnesses, and to go again through the whole of the matters in question, though they have been gone thoroughly into by the arbitrators: if required by one of the parties; and that, though on the acceptance of the office it was agreed, he should not be required to examine any witnesses, but should have the arbitrators' notes, (which, in this case, were very voluminous,) and from them, he was to draw his own conclusions: notwithstanding he must, if requested, despite such agreement, examine the witnesses, though the very purpose of the request was delay: on his refusal the Court held the umpire should have heard the evidence: the award was set aside upon that ground (c); but application must be made to the umpire to rehear the evidence (d). Where the arbitrators and the umpire together, examined the property, (the subject of the submission), and the witnesses for four days, and then the umpire left, though he was requested by

Duty of umpire on accepting of the appointment.

Contrà, the parties had not waived their right to set aside, by their attendance, because it was in ignorance of the mode of choosing the umpire. "The clerk had no power to bind his master and the client, though a trust to a considerable extent is placed in him, yet not one contrary to the terms of the submission; the appointment of the umpire was invalid, and the award is void." Littledale, J. (572.)

(a) *Harding v. Watts*, 15 East, 556; *Mitchell v. Harris*, 12 Mod. 512, S. P.

(b) Com. Dig. tit. Arb. (F.); *vide note, supra*, p. 107.

(c) *Salkeld, surviving Partner, &c. v. Slater and Harrison, Assignees*, 12 Ad. & Ell. 767.

(d) *Hall v. Lawrence*, 4 T. R. 589.

Duty of umpire
on accepting
of the appoint-
ment.

the arbitrators to stay, saying he considered it useless; but, if called upon as umpire, on receiving the statements of the arbitrators, and thought fresh evidence necessary, he would call a meeting; the arbitrators disagreed, and forwarded their statements to the umpire, which contained some evidence one of them had received since he (the umpire) left. The umpire considered it unnecessary to examine the witnesses further, or go into more evidence, and made his award, at which the defendant complained, and said it was necessary his witnesses should have been examined; held, "it is not always necessary to examine the witnesses, but if it had been, and the umpire had been called on, it might have been ground for setting aside the award if he had refused; the defendant knew the depositions were before him, and he should have required him to examine the witnesses," if he thought it necessary. When the award is made, the objection is too late (a).

Agreement of
the arbitrators
in part, refer-
ence to umpire.

Where the arbitrators had agreed on some parts of the matter, but disagreed upon other parts, and requested the umpire's decision on those parts, it was held the umpire was a judge between the parties, and not between the arbitrators, and that his deciding only the points upon which they disagreed was bad (b).

(a) Denman, C. J., *Tunno v. Bond*, 5 B. & Adol. 488.

(b) *Tollit v. Saunders*, 9 Price, 611. Declaration set out the award, and alleged as breach non-performance, plea *non est factum*, that the arbitrators did not jointly choose. Arbitrators, &c. did not make award, &c. *modo et forma*; the bond produced at the trial bore the indorsement of the arbitrators. The award stated, "on which points the arbitrators could not jointly agree, &c., and the submission of such questions and points to the umpire; it was at the trial contended that the arbitrators choose the umpire to arbitrate between themselves, and not between the parties; secondly, they were bound to determine the whole, or not at all, and that what they did was void, and no award at all, when the whole power devolves upon the

Where the arbitrators had power to enlarge the time, it was held the umpire might do so at a period previously to his taking on himself the conduct of the matter, for the purpose of keeping his jurisdiction alive (a). Consenting to be examined before the umpire is a recognition of his authority (b). Enlargement of time by umpire.
Umpire's authority, recognition of.

The appointment of an umpire supersedes the authority of the arbitrators, and they, from thence, are as strangers to Appointment of an umpire, effect of.

umpire, all is with him; and he having confined his umpirage to one point, it was void; the instrument was neither an award nor an umpirage; the Judge directed a nonsuit, (614).

"I adhere to my original opinion, the arbitrators had unravelled the whole transaction, and then differing upon a part, they call in an umpire to determine between them, and not between the parties; the umpire should have gone into the whole of the case." Graham, B. (618). "The intention of the condition was, that the arbitrators should make an award upon the whole matter; then if they could not, that the umpire should, they have no authority to make an award in a detached manner." Wood, B. (619).

(a) "Enlargement of time by a power contained in the submission, several enlargements of the time were made by the arbitrators, which appeared by endorsements on the order of reference, and also the appointment of the umpire, one or two enlargements did not appear to be indorsed on the reference; the arbitrators not being able to agree, the umpire made his award, the party against whom it was made, refused to perform it, on the ground that the time had not been enlarged, on the eighteenth of May, he was informed by letter the umpire had enlarged the time, which letter was held to be a sufficient notice of the award to warrant the attachment; held, the notice is not necessary to be in any particular form, and that the non-agreement of arbitrators is a disagreement." Tindal, C. J. (593). "It appears by affidavit, though not on award, the umpire enlarged the time; whether the arbitrators had then disagreed or not, is of no consequence, the umpire must have power to keep the proceedings alive." Vaughan, J. (593). "The authority to enlarge the time must vest in the umpire, when the arbitrator's bond is executed, in order to keep his jurisdiction alive." Erskine, J. (593). *In re Doddington and Bailward, supra*.

(b) *Matson and Another v. Trower, supra*.

Appointment
of an umpire,
effect of.

Authority of
umpire when
commencing.

the award, but their signing the award would not invalidate it (a).

The above is said upon the authority of the cases cited, but it must be recollected that Lord Ellenborough, C. J. (b), said the most convenient mode was the appointment of the umpire in the first instance, but it is impossible thereby to conclude that he meant to say that such appointment voids the authority of the arbitrators. It is apprehended the cases go this length, that when the arbitrators disagree and appoint an umpire, that the appointment is a confirmation of their disagreement, and that they are then *functi officio*, but in the case of a prior appointment of the umpire, then, he is only empowered to act upon their disagreement, or by the lapse of the time appointed by the submission wherein to make their award; in the former case, the arbitrator or umpire may make his award within the time appointed for the arbitrators (c); in the latter, in that appointed for his doing so, but, in both cases, the award is the award of the umpire, and of him only.

Arbitrators
when empow-
ered to act
with the um-
pire.

Where the the terms of the submission are, or of any two, such is a recognition of the power of the arbitrators to act jointly with the umpire, and is, in fact, a submission to three arbitrators agreeing that the decision of two of them shall be final; in such case, it is clear the parties are

(a) "Where the terms are that on failure of making an award by a day named, that they appoint an umpire, which they do, and join with him, it has no effect, it is the same as though strangers joined: in law it is the award of the umpire only." (*Best v. Sarjent*, 4 Taunt. 232, Lord Mansfield, C. J.)

"An award is not bad on account of arbitrators joining in making it; an umpire, by signing the award, adopts the language as *his own*." (*Bates v. Cook*, 9 B. & C. 407, citing *Soulsby v. Hodgson*, 3 Burr. 1474).

(b) *Supra*, p. 106.

(c) *Supra*, p. 113.

desirous, if possible, of having an unanimous decision: Coleridge, J., in *Templeman v. Reed* (a), said "the principle which governs such cases is clear, the parties are desirous of having their dispute settled by an unanimous award of three, and no award of two can be good until the third has had a full opportunity of joining in it, and has declared his dissent from it, or has withdrawn himself from the reference."

When one of the arbitrators refuses to sign his name, the mere insertion of his name into the award may be regarded as a surplussage, and the misrecital (on his refusal) does not vitiate his award (b).

The contrary was held by Leach, V. C., in the case of *Thomas v. Harrop* (c), the agreement of reference therein

(a) 9 D. P. C. 964, *et seq.* Submission to three, the arbitrators disagreed, they decided each should furnish a statement to the umpire, and he was to make his award without any further meeting; the umpire, in conjunction with one of the arbitrators, made the award. "The other should have had the opportunity of another meeting, the umpire should have endeavoured to have brought them together again, and have presented his view and the reason of it to their consideration, for it by no means follows the *dissentiente* might not have been convinced by his argument. A note to the third, saying the two had agreed, and requiring his charges, is of little moment, for the award was agreed upon; if one refused, then the others had a right to make the award."

"Where submission states any two may make award, an award by two is a good award, but it must be after discussion with the other arbitrator, and if it appears there is no chance of agreeing, the others may proceed without him; but after a memorandum of an award is sent to the objector, and he writes his objections, the others, without meeting him, and considering how far their views may be varied by his objections, execute an award as unfavourable as before. Held it was only on full notice they were entitled to proceed without him. (*Perring v. Keymer and Wife*, 3 Ad. & El. 247, Lord Denman, C. J.)

(b) Parke, B., *White v. Sharp*, 1 D. & L. 1031.

(c) 1 Sim. & Stu. 524.

Insertion of
arbitrator's
name in the
award.

stated, that the award should be made by four persons, or any three. An award was prepared, purporting to be the award of the four arbitrators, but was executed by three only, and which was held bad; because it was said, it was not the award of the four arbitrators, being signed by three arbitrators only, and it was not the award of the three arbitrators, because it purported to be the award of four.

This case was noticed in that of *White v. Sharp*, and Parke, B., said, it was very loosely reported, and may have proceeded on the ground that the consent of the fourth arbitrator was not asked, and that he had no notice of the award. If the Vice-Chancellor gave the reasons he is reported to have given for his decision, the reason for the difference suggested as above, in his Lordship's decision can scarcely be held to be the true one; for his Honour seems expressly to have gone upon the principle that an award purporting to be by four arbitrators cannot be supported by three signatures—the cases appear to be exactly the same, (in point) and opposed. In either case, the decisions of the two or the three were in accordance with the intentions of the parties, as expressed in the submission; therefore, it is presumed, would be a sufficient execution of the authority of the arbitrators, and a valid award; the merely naming the third or the fourth arbitrator, is not a matter bound up with, and on which the prior part of the award is dependent, and therefore may be rejected as surplusage, for it cannot be said that the two, or three, who signed, did so only upon the supposition that the third or fourth arbitrator would also do so, for if such a deference to the opinion of any one of the arbitrators appeared, it would, it is apprehended, show such a delegation of authority as to vitiate the award (a). If such view be correct, it is clear

(a) *Supra*, p. 75.

the case of *Thomas v. Harrop* cannot be supported, and that the true exposition of the law is that contained in the case of *White v. Sharp*, which may, on this point, be said to overrule the decision of the Vice-Chancellor.

One of the arbitrators giving way to the opinion of the other, or others, is no ground for setting aside the award, for it is a circumstance which must frequently occur (a), and, without the allowance of which, it is difficult to conceive how an award could ever be made.

One arbitrator deferring to the opinion of another.

Where the terms of the submission were, that the award should be made by the two arbitrators and their umpire, the Court refused to grant an attachment on an award made by the arbitrators only. The use of the word *and* rendering the award much too doubtful (b), on the principle, it is presumed, that as the submission is declaratory of the intention of the parties, it would seem the word *and* indicated that intention; viz. that the award was to be made by the arbitrators and the umpire conjointly, and as it is the intention of the parties which gives effect to awards, it is conceived an award by two, under such a submission, could not be supported.

Award, when to be made by arbitrators and umpires.

The award of an umpire, when he proceeds in accordance with the terms of the submission is binding, and it is not necessary for him to set forth the disagreement of the arbitrators, though his award is made within the time limited for them to make their award (c).

Award of umpire within the time limited for the award of the arbitrators.

(a) Parke, B., *Eadley v. Steer*, 4 D. P. C. 430.

(b) *Heatherington v. Robinson*, 7 D. P. C. 192.

(c) *Supra*, p. 108, note (c), *Spriggins v. T. & H. Nash*, 5 M. & S. 193. It was objected that the umpire in his award should set forth the disagreements of arbitrators. "The argument would have power, if by law it was necessary for an arbitrator or umpire to deduce his authority strictly from the required premises on the face of the award, which is not necessary; but if it appears on the face of the award that the arbitrators had not disagreed, it would be deficient. It has

Mistake of
umpire.

Where an umpire makes an error, or a miscalculation, the matter is decided upon the rules and principles which govern arbitrators (a).

Errors reciting
the appoint-
ment of the
umpire.

If, in reciting the appointment of an umpire, a wrong Christian name is used such an error would not justify setting aside the award, for it was not necessary to make any recital (b).

Partiality, &c.
of an umpire.

The partiality or misconduct of an umpire is governed by the same principle as that of an arbitrator (c), and it was held the following circumstances were insufficient to presume misconduct; the reference was to two arbitrators, with power for them to choose a third, who was appointed at the instance of the defendant's arbitrator, by whom the evidence was taken down, at the request of the umpire; the evidence of the plaintiff was either rejected or not taken down, and the umpire, in coming to a decision, trusted to those notes, and awarded that the plaintiff had no cause of action, Wightman, J., said "it was the plaintiff's choice to submit to the umpire, who is, at the least, an indifferent person, and that it was impossible for the Court to examine the proportion of attention given to each arbitrator by the umpire" (d).

been laid down that the umpire may proceed by anticipation, if not interrupted by any act of the arbitrators, such an award would, I conceive, be good." Lord Ellenborough, C. J. (194).

(a) *Supra*, p. 58, *et seq.* *Irvine v. Eldon*, 8 East, 54. *Renfree v. Bailey*, 6 East, 311, S. P.

(b) *Frew v. Burton*, 1 C. & M. 533.

(c) *Supra*, p. 101.

(d) *Waltonshaw v. Marshall*, 1 Har. & Wol. 209.

THE AWARD, NECESSARIES TO.

The instrument by which a matter is referred to the decision of one or more persons, is called a submission (*a*), and if it recites that the award and not the submission shall be made a rule of Court, it is immaterial (*b*), it does not act as a stay of proceedings, or oust the Courts of law or equity of their jurisdiction (*c*), though it is a breach of faith to proceed after a submission to arbitration (*d*).

Submission,
what.

Proceeding
after submission.

The decision of the arbitrators upon the subject-matter of the submission is called an award, and need not be expressed in any precise form of words (*e*), and as there is no

Form of wording award,
effect of.

(*a*) *Supra*, p. 9.

(*b*) Consent in submission was to make award, and not submission a rule of Court; held, no objection, citing *Powell v. Phillips*, which overruled *Harrison v. Grundy*, 2 Stra. 1178; *Pedley v. Westmacot*, 3 East, 602.

(*c*) *Thompson and Another v. Charnock*, 8 T. R. 139, Lord Kenyon.

(*d*) *Supra*—*Williams v. Gwynne*, 2 H. & Wol. 312. There is no doubt this is a breach of faith. I therefore see no reason why this agreement should not operate as a stay of the proceedings, and if motion made within the time after notice of taxing costs, it is in time (313). *Littledale, J.* "This was proceeding to trial in defiance of an agreement to refer, and no sufficient notice was given of intention; on plea of the agreement being entered into when drunk."

(*e*) *Lock v. Vulliamy*. Reference was by verbal agreement, of the award being contained in a letter, which was in these terms: "I have examined the drawings, &c., for which nothing was awarded, but in consideration of services out of doors—to meet the circumstances in a liberal manner I propose Mr. Vulliamy should pay Mr. C. Lock 10*l*," the Judge at the trial thought the letter was not an award, on rule for a new trial, "I think the letter is not an award. I agree that no precise words are necessary to form an award. It is sufficient if the language be such as to show clearly that the arbitrator has come to a decision upon the points submitted to him, a mere suggestion that if a person meant to do a liberal thing, he should pay 10*l*, is no award." *Lock v. Vulliamy*, 5 B. & A. 603, Lord Denman, C. J. "If it had appeared in this case that the arbitrator had decided that one should recover so much, and no more, it would have been an award." *Parke, J.* (*Ibid.*)

Form of word-
ing award,
effect of.

authorized form of expression, it is suggested that it should therefore be free from technical verbiage, and simply, yet clearly, express the judgment of those making it. When the award is made, it is binding upon all parties to the submission (a), and if the opinion is positively stated a mere direction besides to do a something immaterial, will not alter its effect (b); and so an award, in some cases, will act as anastoppel (c).

"A. agreed by letter that two gentlemen (named) should determine the amount of dilapidations, and if they could not agree, that he would pay a moiety of the expense of an umpire, which was agreed to, the umpire signed a report. I have surveyed and find dilapidation 55*l.* 5*s.*; held an award." (*Whitehead v. Tattersal*, 1 Ad. & El. 492, Lord Denman, C. J.)

(a) *Bailey v. Lechmere*, 1 Espin. 377. Where persons submit their differences to third persons, they should be bound thereby, and on a determination and dissatisfaction, he should not be allowed to have recourse to an action for after taking the chance of an award in his favour, it was too late to recede from his engagement, but if there were circumstances which would render the award bad, as not hearing witnesses, or partiality, he would be allowed to show it at the trial." *Lord Kenyon*, C. J. (378).

Taylor and Others v. Parry and Others. An agreement that the boundary of an estate shall be marked out by A., which is done, (agreement was made by the landlords of one property, and landlords and lessees of another) such finding is binding upon the contracting parties, and the case is as strong as if in express terms defendants had signified their assent." (1 M. & G. 1, *Tindal*, C. J. (592).)

(b) *Price v. Hollis*, 1 M. & S. 107. Agreement by two to lay a case before a barrister for his opinion, and that they would be bound thereby. The opinion was in favour of the defendant, and there was expressed a doubt whether there was not a verbal error in an act of Parliament. The opinion is positive and decisive, and with the recommendation that the Parliament roll be searched. The parties agreed to abide thereby, and when given it was in the nature of an award, and became final between them, the Court would not look to see whether it was right. If the statute was misprinted, plaintiff should show that fact.

(c) *Doe on the demise of Morris and Others*, 3 East, 15. Ejectment, it appeared in evidence on the part of the plaintiff, that a prior ejectment was brought on the demise of the same lessors against same defendant, for part of the same premises, which was referred, and an

In all cases an award should be construed liberally and favourably, (a) there should be no strained construction to take any matter awarded out of the submission (b); and where it exceeds the submission, it shall be good for so much as is therein. If it be that one of the parties and a stranger pay, it is good against the party, though void as against the stranger (c). So if it be a submission of all actions, *ita quod &c.*, and the award be that one shall pay so much at a future day, and then shall make a release of all actions personal, the release shall be only of actions which were contained in the submission. So in all cases (unless the submission gives a larger power) wherein releases are awarded, it applies only to such matters as were in *in esse* at the time of the submission (d), but it must

Construction of
an award.

Release, award
of.

award was made against the defendant, who was desired to relinquish the premises, but refused, and still retained possession. The defendant offering to go into his title, but the Judge considered he was precluded by the award from disputing lessor's title. The award cannot operate as a conveyance of the land, but there is no reason why defendant should not preclude himself by his own arrangement from disputing the title of the lessor in ejectment, *per curiam*.

Submission as to property in a house, award was against the plaintiff. If a tenant is estopped from denying his landlord's title, he is also estopped from treating as his tenant him whom he has required to enter into that relation with another. (*Downs v. Cooper*, 2 Q. B. R. 262, Lord Denman, C. J.)

(a) "The presumption in the favour of an award will be, that the duty was rightly performed." (*Doe dem. Clarke and Another v. Stilwell and Another*, 8 Ad. & El. 645, Lord Denman, C. J.) "As to the time of executing and publishing an award, we must presume it was made according to arbitrator's authority." (*Ib.* 649, Littledale, J.)

Wood v. Griffiths, 1 Swanst. 43. "In modern times, in construing an award, it has been considered the duty of the Court to find that it is certain and final, instead of leaving it to a construction which would in effect destroy nine-tenths of the awards ever made, and if possible to put one consistent sense on all the terms." (52, Lord Eldon, Ch.)

(b) Com. Dig. Arb. 29.

(c) *Ibid.* (E. 8).

(d) *Ib.* (E. 9). "We are not to assume a possible case out of an award, but to intend every thing in favour of it." *Dallas, C. J. Doe dem. Rich-*

be shown by the opposite party that the matter demanded arose after the submission, or it will be included in the release, and if particular actions be submitted, and a general release of all actions be awarded, it shall be presumed that only such actions are intended to be released as were submitted (a), for all the matters should be in pursuance of the submission, and the decision should be in accordance with its intention, and if made of things out of the submission, it is void as to them, as a payment by another, or act to be done by a third person, for it would not appear that such direction is of any advantage to him, and, therefore, as to that party the award is void (b). As to assure land to a party and his wife, it is void as to the wife if not within the submission. To be bound with sureties; void as to the sureties, to be at such a place with his counsel to hear the award (c).

Where the stranger is only used as an instrument, the award is good, as to pay money to a stranger, for the use or the benefit of the parties. So if the contrary do not appear, for it shall be intended for their benefit, as to surrender a copyhold, or make a feoffment with a letter of attorney to B. to make livery, that he shall levy a fine (now simple assurance) in fee to a stranger, as that *cestui que use* shall cause his feoffees to make a release to one in possession (d).

Award must be in accord with submission.

Something to be done by a stranger.

Stranger used as an instrument.

Payment to stranger for the benefit of a party.

Where the payment to a stranger appears to be for the advantage and benefit of the party, it shall be good: as if an

ardson v. ———, 8 Taunt., reference was of an action of ejectment, and if cause of action was found for plaintiff, he was to have costs, arbitrator awarded a sum for rent during the time defendant held over, but said nothing about cause of action. Dallas, C. J., "I think the award is good, except to that part which relates to the releases, and that the award is not vitiated by the surplusage."

(a) Com. Dig. (E. 10).

(b) Ibid, (E.)

(c) Ibid.

(d) Ibid, (E. 7).

award be that he pays A. to whom his surety was bound for him. So where there is a submission by a trustee with the assent of the *cestui que trust*, an award of payment to the *cestui que trust* is good. Where the submission is by the husband for a debt due to the wife before marriage, an award of payment to the husband and wife is good, but the award does not bind a stranger to do any act as a release, confirmation, &c. (a).

Payment to stranger for the benefit of a party.

An award of a thing (not *in esse*) arising after the time of the submission, is void as if it be of rent which shall be due at Michaelmas next. Of a release of all actions until the award is made; a direction of mutual releases to the time of the award will not render the award bad, but a tender of releases to the time of entering into the submission, is a sufficient performance (b). So it is also said, that an award that one shall pay for writing the award, or that the parties shall pay the reckoning at the meeting of the arbitrators, is void for so much (c), which would appear most difficult to sustain, for by entering into the submission, the parties by an implied promise, it is presumed, agree to compensate the arbitrators for their trouble, and, therefore, the costs of the arbitrator would seem to be a something incidental to the submission, and in the contemplation of the parties at the time of entering thereinto (d).

Award of something not *in esse* at the time of the submission.

When all the matters in difference are submitted, the whole of the case should be brought before the arbitrator, for a party omitting to bring any fact before the arbitrator, will be concluded of his remedy, therefore, unless he can show that the matter did not exist at the time of his entering into the submission (e). So an agreement which recites

Submission of all matters in difference.

(a) Com. Dig. Arb. (E. 7).

(b) Com. Dig. Arb. (E. 2).

(c) Ibid.

(d) *Supra*, p. 105.

(e) *Smith v. Johnson*, 15 East, 214.

Submission of
all matters in
difference.

a claim, and refers all matters in difference, does not confine the inquiry of the arbitrator to that matter only, the recital merely indicates the motive of the submission, it does not limit the arbitrator's power (a).

Arbitration of
a matter *malum*
in se and *malum*
prohibitum.

Where money is employed or invested to effect that which is *malum in se*, it cannot be recovered, and Heath, J., said, he could see no distinction between a thing which was *malum in se*, and *malum prohibitum*, as both tend to encourage a breach of the law, and of such opinion were the Court, and set aside the award for so much as related thereto (b).

Sufficiency of
award.

An award must be sufficient upon the face of it. The finding by an arbitrator of no cause of action, disposes of the whole matter; and, in ascertaining the meaning of an award, every part must be construed together, and when the submission contains a clause that the arbitrator may make one or more awards, there can be no doubt that the arbitrator might award upon one entire subject of dispute,

Clause to make
one or more
awards.

(a) Lord Denman, C. J., *Carlton and Watson v. Spencer*, 3 Q. B. R. (698).

(b) *Aubert v. Maze*, 2 B. & P. 371. Verdict by consent, subject to an award, and order of reference was made a rule of Court. Award 95*l.* 14*s.* 9*d.* to be paid defendant for money lent, &c., and then further the plaintiff is indebted in the sum of 680*l.* 2*s.*, being one moiety of losses on policies underwritten by agreement between the two. To set aside award, "if a partnership be legal, the law requires an implied consent (to transact all transactions connected with the partnership), so if it be illegal, yet if the payment be made in the course of the partnership business, a jury will be warranted in finding an implied consent to that payment, without which the partnership could not subsist an instant." Lord Eldon, C. J. (373). "If a concern in which money is advanced be *malum in se*, it cannot be recovered, and I see no distinction between a case *malum in se* and *malum prohibitum*, as both tend to encourage a breach of the law." Heath, J. (374). "The arbitrator has asked our opinion, and we are bound by the authority of *Mitchell v. Cockburn* (2 H. Bl. 379), to set aside the latter part of the award." Rooke, J. (375).

and dispose of all the other matters; but it is not a condition that all the matters should be disposed of by him (*a*).

Where an arbitrator had to decide various claims, one against another, an award of no cause of action was held sufficient (*b*); so where it was not shown that any other matter than the cause was produced before the arbitrator (*c*); so where on reference of a cause, the submission contained the following clause—the costs of suit, of the reference, and of the award to abide the event, as in the case of a trial at law, that final judgment be entered, as the damages were found for either, and that execution shall issue thereon. Award that the plaintiff has no cause of action, but was to pay the defendant 50*l.*, and that it is not intended to prevent the plaintiff from recovering his commission, but that at present he is not entitled thereto: (there was an affidavit that whatever commission plaintiff was entitled to was due at the time of the award;) held, the arbitrator had no power to enter a verdict, and by awarding no cause of action, he disposed of the cause (*d*); so an award that an action shall cease, and that there is a balance of account due from the plaintiff to the defendant is sufficient though informal (*e*). No cause of action.
That action shall cease.

An award that nothing is due to the plaintiff is sufficient, for it is presumed that things remain in *statu quo* from the Nothing due.

(*a*) *Wrightman v. Bywater*, *supra*.

(*b*) *Haylar v. Ellis*, 6 Bing. 225.

(*c*) *Wyatt v. Carnell*, 1 Dowl., N. S. 326, *Wightman, J.*

(*d*) *Harding v. Forshaw*, 4 D. P. C. 762.

(*e*) That the action shall cease, and on the balance of accounts, there is due by Eardly to Steer 660*l.*, 14*s.* 11*d.*; one of the objections to the award was, that it was not final, as it did not decide the event for either, a direction that the action shall cease, and that on balance of account plaintiff is indebted to defendant, evidently means that plaintiff has no cause of action; the legal and proper form would have been, to find no cause of action, (writ was issued, but issue was not joined,) held sufficient. (*Eardley v. Steer*, 4 D. P. C. 430, *Parke, B.*)

time of the submission, unless the contrary be shewn by the affidavit (a).

Good cause of action.

Where the action was for negligence, and money received, a payment was made into Court to cover the money count, the finding was, that the plaintiff had good cause of action, and gave damages; it was objected, that by mentioning the cause of action only, it did not appear that the arbitrator had inquired into all the matters submitted; held, the award was on the whole matter, and the verdict was, in effect, on all the counts (b).

Determination of the matters in issue.

Any award which determines the whole matter in issue is definite, and though it be not found upon the particular issues, but in gross (c); so where an action was in trespass for assault and taking away goods, a gross verdict was held sufficient (d); so where the right to tithes, of two adjoining

Tithes, submission of.

(a) *Dickens v. Jarvis and Smith*, 5 B. & C. 580, Bayley, J.

(b) *Dicas v. Jay*, 5 Bing, 281.

(c) *Vide infra, Issue*. Disputes arose between G., and a company, respecting certain goods shipped on board one of the company's vessels, as to whether they were delivered: G. commenced an action in Scotland, for the recovery of the goods, or their value, and of the costs; action was referred, the costs of reference, of award, and of the action to be in the discretion of the arbitrators; award, 238*l.* to G., and 38*l.* as costs of reference, &c., shall be paid, &c., and costs of making the agreement of reference a rule of Court, and that the company do keep the goods. The sum in the Scotch cause must be meant to include the costs, the award that the parties ordered to pay the money should keep the goods, imposes what could not have been enforced at law, it was just and sufficiently correct on arbitration. (*Gillon v. The Mersey and Clyde Company*, 3 B. & Adol. 497, Lord Tenterden, C. J.) "I am not aware that there is any objection in awarding one sum in respect of the whole." Littledale, J.

(d) Declaration in trespass, for entering the plaintiff's house, and taking away his goods, for entering another dwelling-house, and turning out the plaintiff, and for assaulting the wife of the plaintiff, referred at trial; the arbitrator ordered that the verdict for plaintiff should stand, and the damages to be reduced to 35*l.* (The terms of

parishes were referred; the arbitrator finding it was impossible to distinguish the particular parcels of land, to the tithe of which the parsons respectively were entitled, he apportioned the titheable produce itself, and which was held good (a); so a submission between a parson and his parishioners, as to whether his tithes should be paid in specie or not, it was held within the submission to award that so much a year should, in future, be paid for tithes (b). It is conceived such a submission would be binding only upon the parties actually signing the submission, but as against those not signing it would have no effect.

Tithes, submission of.

An award ought to be certain, that is, of something *in esse*, defined and positive, and should be intended, and operate as an ending of the matters in difference. Where an agreement was entered into to purchase a business, A. entered into possession, but, being dissatisfied, filed a bill alleging deceit, and praying an avoidance of the agreement, &c., and for an injunction against the defendant's proceeding at law for the recovery of the money conditioned to be paid by the agree-

Certainty of an award.

the reference were to settle all matters in dispute, and to determine what should be done by either party.) Motion to set aside the award, first, the property in the goods should have been decided; secondly, a quantity of china was claimed by the plaintiff, and about which the arbitrator had not decided; and thirdly, that the assault was committed in the husband's absence, and that no loss of society was proved, and therefore the plaintiff was not entitled on the last count. Held, on the first point, that the arbitrator had never been asked to find the property in the goods, and under this submission he could not, for that purpose the assignee should have been joined; as to the second objection, it is sworn that it was abandoned; as to the assault, it is admitted that there was but one assault proved. "Held sufficiently final." Bolland, B. (*Bird v. Cooper and Another*, 4 D. P. C. 152.)

(a) *Prosser v. Goring*, 3 Taunt. 526.

(b) Roll. Abr. (D. 8.)

Certainty of an award. ment ; defendant did not put in his answer in time, and the

injunction was granted until answer, and clearance of the contempt of Court ; all which matters were referred with a clause, if the award was not made by a certain time, each might resume their remedies ; the award, amongst other things, directed each should pay his own costs of the suit in Chancery, but did not state the agreement should be cancelled according to the prayer of the bill ; held, the subject of the reference was, whether the agreement should be put an end to, which the arbitrator had not done, and that therefore the matter was uncertain (*a*) ; so where a cause and all matters in difference were referred, a verdict was taken at the trial, subject to an award, as the arbitrator found : he directed the verdict entered for the plaintiff to stand, and the defendant, on a day named, to pay him 260*l.* 12*s.* 6*d.* ; held, it was uncertain whether the arbitrator meant the nominal verdict should stand, and the sum awarded to be for the matters in difference, or whether it was to be substituted for it (*b*). An award against two persons, that one or other shall do a certain thing, is bad (*c*). Where a cause and all matters in difference were referred, and the arbitrator, in the award, did not mention the cause, but directed the payment of a sum of money ; such finding held bad, for it would be consistent therewith to suppose that the plaintiff succeeded in the cause, and that the award of the money was upon the matters in difference (*d*) ; so where the arbitrator awarded one entire sum upon the matters in difference, which were referred with the cause, and produced before the arbitrator, and

(*a*) *Tribe v. Upperton*, 3 Ad. & E. 295.

(*b*) *Martin v. Binge*, 4 Ad. & El. 973 ; *Lund v. Hudson*, 1 D. & L. 236, S. P.

(*c*) *Lawrence v. Hodgson and Others*, 1 Y. & J. 16, *Alexander*, C. B.

(*d*) *Pearson v. Archbold*, 11 M. & W., *Lord Abinger*, C. B.

he directs a verdict to be entered therefore (a); so where a building contract was referred, and the arbitrators awarded a gross sum to be paid, and said nothing about the defects, the finding of which was an object of the reference: the Court held the award was bad (b); a direction to pay on the before-men-

Award must be
certainty.

(a) Action for 28*l.* 12*s.* 5*d.*, reference at nisi prius of cause and all matters in difference; at the reference a second bill was produced, some of the matters bearing date before the action was brought; a few were for work done subsequently; this second bill was investigated; award directed a verdict to be entered of one entire sum, whereon it was objected that it was an excess of authority as some part of the latter claim was included or there was an omission to award thereon. Cause and all matters in difference were submitted, and the arbitrator was empowered to enter a verdict for such sum as he should find due, instead of nominal damages. "Comparing these words, I think it must be considered, as a finding only of the sum claimed in the cause; if so, there is no finding as to the matters in difference, which yet were investigated before the arbitrator, unless by directing defendant to pay the costs, or by his silence he can be considered as finding nothing in respect of the matters in difference, I think the award must be set aside." Coleridge, J. (*Gyde v. Boucher*, 5 D. P. C. 129.)

(b) *In re Rider and Another v. Fisher*, 3 Bing. N. S. 874. Award, after reciting contract for building a house, and to leave the building, &c. in a perfect state, but which had been found out of repair, &c., and differences had arisen and which it was agreed should be referred to certain arbitrators to determine all matters in difference relating to such alleged defects, and for claim for overwork. Award, Fisher should pay 296*l.* without deduction, and the same should be received in full satisfaction, &c. for all the matters in difference between them: to set aside; as not containing any decision upon the alleged defects and imperfections, &c., and of which the arbitrators were expressly directed to inquire (876). "The omission to certify the defects might subject Fisher to costs which otherwise he might be exempt from. The arbitrators were to determine all differences, claims, and disputes relating to the alleged defects in the buildings, to the charge for extra work, and the deductions for examinations, and to ascertain what balance might be due in respect thereof—they have taken no notice of the first object of the dispute, and it is doubted whether the sum awarded is to be applied in discharge of the existing work or to the general balance of the account." Award bad. (*Tindal, C. J.*, 877.)

Award must be certainty. tioned 1st of May, when no such day is before-named, is bad; so on a submission of the title of certain land called K., an award that one shall have so many acres in K., without giving any name to the land, is void, though it be averred it is the land called K.; so to pay so much for every quarter of malt, as malt may be sold for, without saying in what place the sale shall be; so to pay arrears of rent incurred after a purchase, without saying when the purchase was, or when in arrear. So to pay the costs of a suit now depending; but if it be that he pays the costs of such a suit to be taxed by the prothonotary; or the costs of such a suit generally, it is good. So where the matter may be ascertained by averment, as an award that A. shall pay to B. a debt for which he is bound, without saying in what sum. So to pay all monies expended in such a suit. An award to make a release, or pay money without saying at what time, is good, for if a request is necessary, it must be at a convenient time after request; if no request is needful, then in a convenient time. An award without a date, to do a thing in seven days after date, is good, for the date shall be computed from the delivery. So an award that a certain erection upon the defendant's soil shall be pulled down without saying by whom, for the defendant, who is the owner of the soil, shall pull it down (a). So that each shall pay his own costs, and that the defendant shall pay 5s. for making the first breach (b).

Award must not be impossible.

An award must be possible, and if it be impossible, it

(a) Com. Dig. Arb. (E. 11).

(b) *Hawkins v. Colclough*, 1 Burr. 274. The certainty of an award may be judged according to a common intent, and in consistence with a fair and probable presumption, the 5s. awarded is plainly in satisfaction of this same action and is therefore a discharge of it on being paid or tendered. (Lord Mansfield, C. J., 277. Held final.)

shall be void, as to pay money on a day passed ; but if it becomes impossible by the act of the party or a stranger, it shall be no excuse, and he shall be bound to perform it (a), for being possible at the time of making, it shall not afterwards be rendered otherwise (b).

Award must not be impossible.

An award must be reasonable, if it be that one shall serve the other for two years, or to release a right to land in satisfaction of a trespass, or to cause a stranger to do a thing over which he has neither legal or equitable control, as to command justices to levy a fine, it is bad. To discontinue an action is good, for though it be the act of the Court, yet the default is the act of the party. So also to be nonsuited, or to pay a less sum in satisfaction of a greater (c).

Award must be reasonable.

An award should be mutual, for it is the joint act of the parties which gives the arbitrator his power, and the promise of one is the consideration for the promise of the other. Therefore if it be of one part only, it is void, as that one shall be quit of all actions which the other has against him. So where A. submits for B., the award, if between A. and C., is void, unless it be to the use of B. So where the decision is that each shall do something, but which is void as to that which one of the parties has to do, it shall void the whole ; but if an award be that one shall give 40s. in satisfaction, and the other shall give a release, though void as to the release, it shall be good for the 40s. because being given in satisfaction, all matters are thereby discharged ; the release being mere surplusage. So, that one pay 10*l.*, and on receipt the other shall give a release, is good (d), though it was objected

An award must be mutual.

(a) Com. Dig. Arb. (E. 12).

(b) Com. Dig. Condition, (D. 1).

(c) Com. Dig. Arb. (E. 13).

(d) Com. Dig. Arb. (E. 14).

Award should be mutual. that nothing was awarded against the other, until after the receipt, and that he was not bound to receive it; it was held that an award to pay so much, obliges the other to receive it.

An award must be final. An award must be final, for the intention of the parties in removing their disputes from the jurisdiction of the Courts is, that all disputes between them (which were in existence at the time of the submission) should be finally settled and arranged, as in a case where the reference was of certain rent due, and a replevin suit (all matters in difference were referred), the abitrator found how much rent was due, but directed nothing to be done in respect of the replevin suit: the Court held the award was bad as not being final (a).

Not finding money due. Where a matter touching certain bills was referred, an award which did not find how much had been received thereon, the party holding them holding in wrong; was held bad (b). Where it is necessary that a sum of money should be ascertained in order to effectuate the intention of the parties, but which is not, and thereby a fresh inquiry is occasioned, such an award is not final (c).

(a) *Leeming v. Teamley*, 5 B. & Adol. 403.

(b) The circumstances were as follows: A. and B. had certain dealings, for which five 1000*l.* bills were given by B., and which came into the hands of C. A. became a bankrupt, and the question between his assignees D. and C. was, his right to retain the bills; the arbitrator found that the bills were the property of the assignees, and that they should be delivered to him, and if the bankrupt had received any part of the money on them, he was to pay it over with interest from the receipt until the payment of the money. A rule was obtained to set aside the award, for not finding how much had been received on the bills, and whether they were partly or wholly paid, and that there were no damages awarded for the detention of the bills, and therefore the award was not final. Lord Denman, C. J., held the question as to the proceeds was the very matter referred.

(c) A deed of submission between C. and D. contained the following

Where an ejectment on two demises is referred, the arbitrator must say on which, or whether on both the demises the plaintiff recovers, or the award will not be final, for his being silent as to the other part of the land, is not tantamount to deciding that the plaintiff has no right thereto (a). Not stating on which demise finding is on.

clause "that if the said arbitrators award any money to be paid to C. by D., the said arbitrators should in their said award (if a certain mortgage be still outstanding) authorize the payment thereof to A. B. in reduction of the said mortgage debts, and award and direct that the said C. should, at a time to be then named, pay to A. B. such other sum of money as would be sufficient to entitle the said D. to have the estates comprised in the said mortgage released, and his title deeds and guarantees given to the said A. B. by way of deposit restored to him." The award found a sum was due from D. to C., and directed the payment to be made at certain times to C., with liberty for D. to make such payment to A. B. in reduction of the mortgage debt, and that within a month after such payment, C. should pay to A. B. such a sum of money as would entitle D. to have his estates, &c. restored to him. "The sum actually due to A. B. was not ascertained at the time of making the award, a new and distinct inquiry beyond any thing done by the arbitrators is indispensable, to fix the sum, upon the payment of which, the defendant would be released from his obligations, and obtain the return of his securities, and which sum is by the terms of the deed after the payment of the sum awarded to be paid by D. to pay to A. B. This matter (the money to be paid to A. B.) was by the plain meaning of the deed a matter to be conclusively decided by the arbitrators, and being undecided, the award is not final." Lord Denman, *C. J.* (*R. L. Hewit v. J. Hewit*, 1 Q. B. 115).

(a) Action of ejectment laid on two demises, which was referred, and if found in favour of the plaintiff, he was to be at liberty to sign judgment, as at nisi prius : award, plaintiff was and is entitled to the possession of a certain part of the land sought to be recovered (i. e. and set out the part so adjudged by referring to the map), and the award concluded without a further adjudication. "The arbitrator confines the award to part of the land sought to be recovered ; omission of mention of the remainder is not tantamount to deciding that the plaintiff has no title to it ; so also arbitrator should have stated on which demise plaintiff ought to recover, it is possible the land may

Not stating on
which demise
finding is on.

So to pay so much, and if there be proof that within a month that more is due, it is not final. So to do that which the arbitrators, on advice at the assizes, shall appoint. So an award that each shall be nonsuited or discontinue his action, is not good, for they may sue *de novo*. So that A. shall give B. a bond for such a sum, with such sureties as B. shall approve, and that they shall execute mutual releases, is not final, for if B. will not approve of the sureties, nothing is done (a).

Finding dis-
tributively.

Where all matters in difference were submitted, and the arbitrator found that the property of a pump was in A., and that B. had a right to the use of it, and that it should be repaired at their joint expense, it is final (b).

be comprised in both, still, he should say." Littledale, J. (242). Award bad. "If this by implication is an award for defendant, on all which arbitrator does not mention, the Master may so tax the costs, and the defendant may set up the award in a future action brought for the residue, on the same demises, for an award for a defendant in ejectment is a bar. But we cannot see that the arbitrator has determined at all as to the residue, and such determination is the defendant's right. I think also the award is bad, for not showing on which title the plaintiff had a right to the part named." Patteson, J. (244). "Here is an award respecting a portion of land claimed on two demises, but arbitrator does not say on which the plaintiff is to recover, that, in substance is, he does not say which is to recover the land, the award is uncertain." Coleridge, J. (246). (Doe dem. Madkins v. Horner, 8 Ad. & El.)

(a) Com. Dig. Arb. (E. 15).

(b) Reference as to the ownership of property, oven, pump, &c., award, plaintiff had a right to the oven and pump, but the defendant had a right to the use of the water of the pump, and ingress and egress for the purpose of fetching it; the pump, in fact, was to belong to plaintiff and defendant, and to be repaired at their joint expense, the objection was that the pump was to be in common, and yet the pump of plaintiff. The words as to the pump being in common, and yet the property of one, appears contradictory, but is explained by a subsequent direction, which is repairs to be at their joint expense, which shows it is meant to belong to them jointly; in respect to doing the

An award that a sum shall be paid on a day named, and that upon payment of the said sum, together with all costs and expenses, all further proceedings in the said cause should cease, and be no further prosecuted, was held final and sufficient, for the arbitrator awarded a sum certain as due: the latter part may be rejected (a). Where all matters in difference were submitted, and the award directed the payment of a sum of money; it is adjudicating upon an action at law: directing a bill in equity to be dismissed; is adjudicating on the suit in equity: if there be no other matters in difference between the parties besides those included in the action at law, and suit in equity, the award is final (b).

Where the arbitrator directs the defendant to pay 30*l.*, and that the parties should enjoy the property as heretofore. Williams, J., held, leaving the property in the same situation, was leaving it in a state of dispute (c). In

Money to be paid on a day named.

Property to remain in *statu quo*.

repairs; care and management in the agreement, warrant this decision, the award is final. (*Boodle v. Davis*, 3 Ad. & E. 207). "Where all matters in difference are referred (costs being to abide event), each must pay his own, unless every thing be found in favour of one." *Patteson, J.* (209).

(a) *Parke, B., Benwell and Another v. Hinzman and Another*, 3 D. P. C. 502.

(b) *Pearce v. Pearce*, 9 B. & C. 489, Lord Tenterden, C. J.

(c) *Ross v. Clifton*, 9 D. P. C. 356, *sed vide*, *Angus v. Redford*, 11 M. & W. 74. Where a verdict was taken subject to reference (action was by the reversioner against defendant for the continuance of a wall). The arbitrator was empowered to direct the entry of a verdict, and to determine what was fit to be done by either party, the arbitrator viewed the premises, and statements were made of other matters in difference besides the cause, the arbitrator directed the verdict to stand for the plaintiff on all the issues, excepting so much of the first as related to the second count, and as to that it should be entered for the defendant, and the damages to be reduced to 1*s.*, and that the action was brought to try a right beyond the mere right to recover damages; as to the matters in difference, the plaintiff had no valid claim. It was agreed before the arbitrator, that as the first count of

Property to
remain in *statu*
quo.

Angus v. Redford, the Court of Exchequer held, (Parke, B., *dissentiente*,) that if an arbitrator gives no direction as to what is to be done between the parties; he does not think fit anything should be done, therefore gives no directions. It is difficult to understand how these two cases can be said to differ in principle, in both the direction was that the persons should enjoy the property as heretofore, and in neither was the right submitted, decided, or the intentions of the parties effectuated: the ending the contention seemed to be the very question of the submission, and if all matters, as far as may be, were not decided, wherein were the parties benefited. It is conceived the observation of Mr. Baron Parke was most apt, "I think it was obligatory upon the arbitrator to make some regulation upon the matters in difference; it is said he had not power because the defendant's house was in the occupation of a lessee, therefore, he could not enter upon the premises for the purpose of doing anything; but he could have directed something to be done, if the tenant's leave could be obtained, or at the expiration of the term or have given compensation for the continuance of the injury. The intention was to put an end to the disputes, but that is not likely as the matter stands, for the plaintiff may bring another action to-morrow, for the continuance of the injury."

the declaration was bad, if he found for the plaintiff he should arrest the judgment on that count, the arbitrator refused. "If we were to determine an arbitrator had power to arrest a judgment, we should invalidate almost every award ever made. Power to enter verdict is by consent; if he is to have authority to enter or arrest judgment, it should still be by consent. Where a case is referred, and the determination of it requires the arbitrator should find upon the issues of law as well as fact, he may do so, but that is different from the present. If an arbitrator gives no decision as to what is to be done between the parties, he does not think fit any thing should be done and gives no direction." Lord Abinger, C. B., Alderson and Gurney concurred.)

Where there is a new assignment, the arbitrator must notice it, or the award will be bad (a), for if the failure is upon one of the conditions, the conditions on which the award was to have obtained effect has not been performed (b). I submit two things; he might have fairly said, I would not have submitted them singly (c).

An award, to give a bond for payment, is good, so to indemnify B. against a *qui tam* action, so, that a party shall not prosecute any suit upon the bond—that all suits shall cease—that all actions shall cease—so, an award to pay a sum of money on a day named, if he does not pay, then a larger sum at a future day. If an award be to all matters except obligations it is good, for this exception is, an award that all obligations shall stand in force (d).

An award must not be repugnant, as in a case for fraudulent deception, the award acquitted the defendant of all intention to mislead, yet found damages for the plaintiff. Held bad (e). Where two actions, one of ejectment for two

Omission of a
matter
referred.

Award must
not be
repugnant.

(a) Action of trespass, several counts and special pleas, as to some plaintiff new assigned, and signed judgment as on such new assignment, as for want of a plea. Issues were joined on other pleas, notice of trial was given for the issues in fact, and assessment as to the new assignment on trial: cause was referred. Arbitrator decided the matters in question, but did not notice the new assignment or judgment thereon, rule nisi was obtained on the ground that the cause was not ended, for issues in fact were only decided, and which was held to be a good objection, and over which the Court had no means of getting. (8 Ad. & E. 246, note (a), Wykes v. Skipton and Another).

(b) Randall v. Randall, 7 East, 8, Lord Ellenborough, C. J.

(c) Le Blanc, J., Ib. 84, Samuel v. Cooper, 2 Ad. & E. 757, S. P.

(d) Com. Dig. Arb. (E. 15).

(e) Ames and Others v. Milward, 8 Taunt. 637. The cause was referred, and the arbitrator stated the following facts: A. entrusted B. with goods to a large amount, and took B.'s warrant of attorney to secure the same; C. applied to A. to know the character of B., who

Award must
not be repug-
nant.

closes, and one of trespass, were referred, arbitrator awarded a verdict in ejectment, damages 1*s.* for plaintiff: on the action of trespass he found on all the issues but the last (not guilty), for the defendant, and on that, for the plaintiff, and for matters in difference; nothing to be paid by either. By a paper delivered with the award it appeared the action of ejectment was maintainable only on one close, *viz.*, Little Beech, the application was, that the *postea* might be amended by confining it to Little Beech, the Court thought the finding was repugnant, but as the plaintiff had a general verdict he was entitled to keep it, and refused to interfere.

said, on the nature of the application being shown, "he pays me very well," and he would trust him; this passed in the street, on an accidental meeting, and in consequence, C. supplied B. with a large quantity of spirits. B. did not pay A. the money he owed him, extra the warrant, and he refused to trust him with more malt, and entered up execution upon the warrant of attorney, which was set aside by a commission of bankruptcy upon a previous act of bankruptcy. "My decision is, that A. knowing the object of the inquiries, omitted to state the material facts of the debts which B. owed him. I think he meant not to hold out any inducement for C. to trust B., but to confine his information to the questions asked. I acquit A. of all collusion, and all premeditated fraud, to benefit himself at C.'s expense, by subjecting goods to his (A.'s) execution; and I acquit him of intention at the time of withdrawing credit from B. By the authorities in the margin, I am compelled in this case to decide, that the assertion that B. paid well is false, in the obvious sense of the word, &c., and awarded 50*l.* and 18*l.* to be paid to the plaintiffs; rule to set aside award was, that the arbitrator had on the face mistaken the law, and that his adjudication was wrong, being in the teeth of his own opinion." (640).

"I do not conceive, that where a man in substance answers fairly, and does not impart all he knows, it necessarily intends fraud; the words used in framing the count are, defendant intended to deceive and defraud, &c., which the arbitrator expressly negatives; what is fraud? an intention to deceive, how then can such an action be supported, when he is acquitted of all intention to mislead?" Dallas, C. J. (642), award bad.

In an action (a) the pleas being never indebted, payment, and set off, and the arbitrator found a general verdict for the plaintiff, and motion was made on the ground that such a finding was repugnant, Maule, J., said, "may it not be, that though the defendant was never indebted, yet he might have paid and had a set-off," and Cresswell, J., said, "the plaintiff may have made a claim for which there was no pretence, and yet the defendant may have been a prudent man, and have paid the money to avoid litigation." Maule, J., "if on the set-off the arbitrator had found 50% due to the defendant, the plaintiff would have been bound to pay it, and the arbitrator should have so awarded; if the defendant never was indebted, and there was a set-off due, there being a reference of all matters in difference, this would be the result." Tindal, C. J., said, "I think the defendant cannot get over the difficulty, that the arbitrator has not decided the matters in difference between the parties, which relate to the plea of set-off. The point was not decided, because the defendant was willing to give up so much of the award as related to the plea of set-off, which the plaintiff accepted upon the defendant agreeing to pay the costs of the issue (b).

Award must not be repugnant.

Where an agreement was to purchase an estate upon a valuation; to be determined by two arbitrators, they found a certain quantity of land on either side of a brook, which was of a different value, and said that if an error was

Award must be certain and final.

(a) *Malony v. Stockley*, 2 Dowl. N. S. 122. Debt, money had; pleas never indebted, payment and set-off, whereon issue was joined; verdict, subject to award, and to decide all matters in dispute; costs to abide event of reference in discretion of arbitrator; there was no matter in dispute besides the cause; award, verdict for defendants including costs of cause and reference, motion to set aside, if first plea be true the others are false, and though defendant is entitled to costs of cause plaintiff is entitled to others under Reg. Gen. H. T.

(b) *Vide infra*, *Issue*.

Award must be certain and final.

made in the ascertainment of the quantity, then the quantity was to be charged at so much. Held bad, for it was the duty of the arbitrator to ascertain correctly the quantity of the land, and the price to be paid (a).

Direction to make certain works, how to be found.

Where it is necessary to make a direction for the prevention of a nuisance, or an injury to a particular trade, or mode of enjoying a particular object, the arbitrator must ascertain the precise mode in which the works to prevent the grievance are to be effected (b). A direction that the

(a) *Hopcroft v. Hickman*, 2 Sim. & Stu. 130. Agreement to purchase estate on valuation of two persons, which was reduced into writing; after valuation, the defendant objected that the valuation had not been made by the appointed parties; the arbitrators received the evidence of certain builders, and adopted it on the credit they gave to their testimony; if agreement had been to be bound by opinion of the builders, it would have been bad, but an award decreeing if an error is made in a quantity of land on either side of the brook, to be charged at a different rate, it is uncertain and bad.

(b) *Case*. Plaintiff, a dyer, has a right to a certain watercourse and reservoirs for the purposes of his trade without being polluted, &c. by various noxious matters by the defendant, &c. Pleas, not guilty; denial of plaintiff's right *modo et formâ*. Verdict was taken for the plaintiff, subject to a reference, cause and all matters, &c. Arbitrator awarded good right of action, and to recover damages to the amount of 40*l.* directing verdict for that sum, and that the plaintiff has a right to the watercourse without being polluted, &c., and directed certain acts to be done as regards the trade of defendant who was also a dyer, and of certain things to be done at the expense of the defendant for the purpose of keeping the water in its former state, with a direction as to the costs. To set aside, first, arbitrator had not awarded specifically upon each issue; secondly, ambiguous and uncertain, in not describing the precautions to be used; thirdly, not disposing of all the matters brought before the arbitrators; fourthly, in event of the water not being cleansed it does not state how it should be done, affidavits were offered, showing the decision of the arbitrators were distinct, intelligible, and practicable. "As to the first point, I hope it will never occur again, all arbitrators would do wisely to find upon each issue what they think proved thereon; I think the award is uncertain, ambiguous, and not final, because it does not prescribe how the water may be prevented from

said defendant shall at all times take and use all proper and reasonable precautions and measures for the purpose of preventing the water of the said stream or water-course from, &c., from defendant's business, being rendered unfit for the use of the plaintiff, &c., and that certain filtering lodges, formerly used, &c., or other filtering lodges, &c., to be made and completed for the purpose of purifying the water, so far as the same can be pumped and cleaned by the ordinary and most approved process of filtering as asserted, &c., was held insufficient. Lord Denman said, "a direction to filter the water after the most approved method; he did not know whose judgment was to be consulted therefore, for the scientific men, whose affidavits have been read, do not agree. It is said, the arbitrator would run great risk by setting out in his award what acts were to be done, because he might fail in directing them scientifically, but I think he runs a much greater risk of making an imperfect award, if he does not make himself scientifically master of the subject before him. He is bound to understand the matter in dispute so accurately and fully that the acts being done which he has prescribed it may be clear that the award has been obeyed;" and Patteson, J., said, "it was the duty of the arbitrator to specify what particular precautions he intended should be employed by the party." Coleridge, J., said, "the direction of the arbitrator must be so as to preclude future litigation. Awards are to be construed sensibly as all other instruments, but as they bind valuable rights for all time, it is more necessary that the findings should be precise and clear."

Direction to make certain works, how to be found.

Rule of construction of awards.

becoming unfit for the purposes of bleaching, or if rendered unfit, how it may be cleansed and purified; it is exactly the same as if what is specifically directed was omitted, &c." See text for remainder of judgment. (*Stonehewer v. Farrar*, 9 Jurist, 203.)

Award on a scientific subject, direction to arbitrators.

From this case, and the others above cited, it appears clear, that to avoid uncertainty, the arbitrator should distinctly state the matters in question, and if it relates to a scientific subject, he must still decide thereon; which he may easily do by directing the attendance of one or two scientific men before him, and learning from them the methods relating to the particular subject in question, and drawing his conclusions from their statements and his own research (a).

Award must be entire.

An award ought to be entire, and should be made all at one time, not on several days, though within the time limited, but the arbitrators may assemble and settle the matters at several days (b). So all should be present when the matters are discussed, and the evidence is received, for the intention of the parties is to have the judgment of the whole of the arbitrators, and it was said the signing is a mere form, and for the absence of one the Court of Chancery will not set aside an award (c). The case of *Little Roberts and Mitchell v. Newton* (d), proved that when the award was signed, it

Signing award.

was necessary that the assenting parties should be together, and notice should be given to him not assenting. And where two of the parties had differed, and referred the matter to the opinion of the third, a barrister, and said they should not change their minds, and he with whom he agreed would sign the award with him. The barrister went on circuit, and sent up the award by his clerk, who summoned the other arbitrators to attend to sign the award, one of whom did, but not in the presence of the other, though he came in immediately after the signature; it was held the award was bad, the arbitrators not being together when the

(a) *Vide supra, Delegation of Authority.*

(b) Com. Dig. Arb. (E. 16.)

(c) Plumer, M. R. *Goodman v. Sayer*, 2 Jac. & Wal. 249.

(d) *Supra.*

award was completed, for by possibility he who stood out might have been convinced or have convinced others (a). So where the award was agreed upon, and the arbitrators went away, leaving instructions for one of them to prepare the award in form, with an understanding that they would meet again on a day named, and sign it before the appointed day, one of the arbitrators sent the award to the other, residing three miles off, who signed it, and sent it back, and then the other arbitrator signed it, on a motion to set the award aside; the Court refused to do so, but intimated that they would not grant an attachment, but leave the party to take his remedy by action, and Pollock, C. B., said, "we are inclined to think the signing should be done together" (b). The principle laid down in *Little Roberts and Mitchell v. Newton* (c), would warrant that conclusion, but the case of *Stallworth v. Innes* is carrying the principle to its furthest verge.

There appears to be some difference as to the meaning of the publication of an award. In *Brown v. Vawser* (d), Lord Ellenborough said, "the award was complete when it was ready to be delivered, within the time appointed, and prior to the actual delivery the arbitrator was then *functus officio*, and if any accident had happened afterwards to prevent his making a delivery, it would still have been an award." In *Musselbrook v. Dunkin* (e), Tindal, C. J., said, "I cannot think that an award can be said to be ready to be delivered when it is only to be had on submitting to a wrongful demand. The arbitrator might be deprived of compensation

(a) *Supra*, p. 99.

(b) *Stallworth v. Innes*, 9 Jurist, 285.

(c) *Supra*.

(d) 4 East, 584.

(e) 9 Bing. 605.

Publication,
what.

altogether if notice that the award was ready for delivery on payment of reasonable expenses, was not held a publication (a). In *McArthur v. Campbell* (b), an application was made to set aside an award after the time limited by the statute; the arbitrator had given notice that his award was ready for delivery, upon the payment of his charges: the plaintiff considered them exorbitant, and remained in ignorance of the contents of the award for six months; the Court held such a fact was no ground for indulgence (this was a case not within the 9 & 10 of Wm. 3, c. 15, s. 2), and Lord Denman, C. J., concluded by saying (speaking of the judgment of Tindal, C. J., in *Musselbrook v. Dunkin*) (c), "I think these last words need form no part of the definition." In *Brooks v. Mitchell* (d), Parke, B., said, he was inclined to dissent from the doctrine of *Brown v. Fawser*, and that it appeared to him that *Musselbrook v. Dunkin* contains the true principle, and Alderson, B., in the same case said there is little difference between the cases." In the Queen's Bench I presume the Chief Justice meant that the award was complete, from the time the parties had notice in such a way that they could really obtain a knowledge of its contents."

Publication,
when.

It is submitted that there is a publication from the time the parties have notice that an award is made. The term *published* means that the arbitrator shall come to some distinct act to determine his final judgment.

Stamp.

An award delivered under the hand and seal of an arbitrator requires a stamp, and by the 55 Geo. 3, c. 184, the

(a) *Musselbrook v. Dunkin*, 9 Bing. 365, Tindal, C. J.

(b) 5 B. & Adol. 518.

(c) *Supra*.

(d) 8 D. P. C. 395; 6 M. & W. 478, S. C.

same stamp is required for awards as for deeds, not affected Stamp. by the *ad valorem* duty, and not being strictly a law proceeding, is not, it is presumed, affected by the 5th of George the 4th; formerly it was held, "that if an arbitrator delivered an award under seal, as a deed, it must then have a deed stamp, but yet if it were by a writing under seal, but not delivered as a deed, it was sufficient if it had a common award stamp (a). Any thing which can be construed to be an award, as naming a person to determine whether any thing is due, is an award, and requires a stamp (b). But the written verdict of a jury to view, requires no stamp (c). Where the subject-matter of an award is distinct, though several parties be interested therein; the award requires only one stamp (d).

An agreement to enlarge the time, not inserted in the submission, requires a stamp, for it is a new agreement (e), Agreement to enlarge time, stamp when requisite. but where after the usual clauses a stipulation was inserted relative to the manner in which the costs should be paid, it was held to require no stamp (f). Where an award is made Award on an improper stamp. upon an improper stamp, or has no stamp, it is no ground to set it aside unless the opposite party are proceeding to enforce it; for the want of the stamp does not vitiate the

(a) Lawrence, J. *Brown v. Vauser*, *supra*.

(b) *Jebb and Others v. McKierman and Another*, 1 Moo. & Mal. 340.

(c) *Sybray v. White*, 1 Gale, 68.

(d) Two assurance cases were referred, to adjust the claims between several underwriters and the assured; the agreement to refer, and the award, were written upon one stamp; it was objected, that as many stamps were required as there were underwriters, but the Court held that one stamp was sufficient, for the reference is of claims which arise on the policy. (*Goodson v. Forbes*, 6 Taunt. 171; 1 Marsh. 525, S. C.)

(e) *Stephens v. Low*, 2 Moore & Scott, 44.

(f) *Wandborough and Wandborough v. Dyer*, 2 Chitty, 41.

award, but merely renders it nugatory as evidence, as by restamping in one case, and stamping in the other, or by the payment of the penalty, it can be rendered valid (a).

Refusal to
draw up rule
on unstamped
award.

The master may refuse to draw up a rule upon an unstamped award, without the direction of the Court for that purpose first obtained (b).

Adjudication
matter, not
submitted.

Where an arbitrator goes beyond his authority, and adjudicates upon matters which were not submitted to him, if such matters can be rejected without interfering with the other parts of the award, they shall be considered as mere surplusage, and the award shall be held good (c): but when

Surplusage.

(a) *Preston v. Eastwood*, 7 T. R. 95.

(b) *Hill v. Slocombe*, 9 D. P. C. 339. It was submitted that the officer of the Court had no right to object. "The Court think that the state of the documents being mentioned by the officer of the Court, when the documents are handed in, is equivalent to an intimation which compels them to consider whether the documents are in a state to authorize the drawing up the rule. Held, that the rule for an attachment cannot be drawn upon an unstamped award." *Williams, J.* (340.)

(c) Reference was of all matters, but nothing was said of costs, the award gave costs as between attorney and client; it was held, that the party was entitled to the principal sum, on waiving the costs. (*Whitehead and Others v. Frith*, 12 East, 165.)

Arbitrators must determine all that is submitted to them, but all they do must be within the submission. Having so done, if they go beyond, and award something to be done not within the submission, that exception must therefore be considered as a nullity, and be rejected as forming no part of the award. (*Aitcheson v. Cargey*, 11 Price, 57, Best, C. J.)

An arbitrator awarded a certain sum for costs, (costs being to abide the event,) and after the payment, mutual releases. *Cole-ridge, J.*, held that "the award was good, though bad as to the award of costs, which might be rejected," and cited *Aitcheson v. Cargey*, *supra*. (5 D. P. C. 695, *Kendrick v. Davis*.)

Unsted v. Kidd, 1 Chit. 526. Reference, costs to abide the event of reference, in the discretion of the arbitrator; award of 10*l.* damages, and if the costs of action amounted to more than 46*l.* 12*s.* 10*d.*, (the

intimately connected with the substance of the award, in *Surplusage*. such case, it vitiates the whole, and renders the award bad in toto, as where an arbitrator directed certain conveyances should be executed, subject to his approval (a).

sum found due to the defendant in a cross-action,) that, that sum should be set off against the plaintiff's damages and the costs. The arbitrator's power is confined to the costs of reference; he has no right to direct as to the costs of the cause; the award may be good as to part, and bad as to the remainder; it is void as to the costs, and so much was discharged. (529.)

In a case of a stream, the submission was, that the arbitrator was to determine all matters in difference, and to determine what should be done by either in the matter in dispute; among other things, it was awarded, that the defendants should make or complete an overfall or tumbling-bay; it was held that the award, as related to that, was too large, and that such part could be rejected: had the defendant been seised in fee of the land, it would have been good, but not being so, it would be waste. (*Alder v. Saville*, 5 Taunt. 461, Heath, J.)

(a) *In re Tandy and Tandy*, 9 D. P. C. 1044. The submission was as to who should receive the rents, &c., of certain houses, and other things; all matters in difference were referred, and the parties agreed to execute all conveyances, rules, &c., which the arbitrator should direct, the costs of the reference, and of the award, were in the discretion of the arbitrator; he awarded certain sums to be paid, and releases to be executed, and said, in case of any dispute as to what conveyances, releases, or assurances shall be necessary for that purpose, or as to any of the clauses, &c., contained therein, the same shall be settled by such counsel or solicitor as I shall appoint, (1046). "If an arbitrator exceeds his authority, it will make the award bad; but if it can be separate so as to leave the remainder of the award untouched, it may stand, but if it overrides the whole, it cannot be sustained: here the excess, (which is the reservation of power to appoint, &c.,) affects the very substance of the award. "It cannot be said that he has properly decided the matter submitted: all matters must be settled when the award is made; a reservation to act, when all power is gone, is an excess, he cannot so keep alive his authority, or delegate it, as he attempts to do here. The question distinctly was, whether J. T. has a right, as heir at law, to the Bell Inn? and the arbitrator awards, that when the money (mortgage) is paid, J. T. and C. T. shall execute all such conveyances as may be necessary to J. T.; but the manner of the conveyance is left in doubt, and thereby

Surplusage.

Though it is a rule, that an award may be good in part and bad in part, it does not apply, as we have seen when the excess is incorporated with the whole award; nor in a case of omission, for it may be a part of the consideration for the submission (a). So if it can be shown there were other matters in dispute besides those awarded on (and on which the arbitrator was requested to adjudicate), the award cannot in any respect be maintained, but the onus of proof of such matters being in difference lies upon the objectors (b).

Onus of proof of objection to an award.

Award unreasonable or impossible in part.

Not receiving the advantage intended.

So an award may be unreasonable or impossible in part, and yet be good for the remainder. If by the nullity of an award in any part, one shall not have all the advantage intended to be given to him as a recompense, for that which he does to the other, it shall be void for the whole, though it would be mutual, notwithstanding the null part was rejected. As an award that A. shall pay B. 10*l.*, and that B., his wife, and son, shall convey certain land to A., it is void for the whole, for though by the conveyance of the land by B., the award would be mutual, yet A. hath not all the advantage intended for him, for the estate might be in the wife and the son (c).

Award a nullity.

When an award may be considered a nullity, and nothing

the question in dispute. The right to the possessor is undecided; a question which so affects the whole, that it makes the award bad." Coleridge, J. (1048.)

(a) Four actions were referred, and all matters in difference, one of which was an ejectment, and on which there was no award; the condition of the submission was, that the arbitrator should award on the premises submitted to him, (citing *Auriol v. Smith*, 1 Tur. & Russ. 128.) An award might be good in part, and bad in part, where the submission was clearly capable of separation, but not where all the matters were within the submission, and the award was on the face of it entire. (*Stone v. Phillips*, 4 Bing. N. C. 40.)

(b) *Ingram and Others v. Milnes*, 8 East, 450.

(c) Com. Dig., tit. Arb. (E. 12.)

can be done upon it, but by suit, the Court will not interfere to set it aside, because any suit brought to enforce it must fail (a).

An award need not formally express that the arbitrator has adjudicated upon every matter in difference, and when there is a question of contingent damages, and the affidavit which raises the objection, shows they were adjudicated on, it is sufficient (b), and where the arbitrators say we have heard and considered all the evidence, it is conclusive of the award being upon all the matters in difference. Lord Denman, C. J., said, "it does not purport to be of and concerning the premises, but that it is unnecessary, and where there is a set-off, it is not necessary that the demands should be noticed on each side by the award, it is sufficient to state the balance." "An arbitrator has jurisdiction over all matters down to the submission, but not of matters which arise after, though such a power may be given him, and I fear if an action was brought for any part of the contingent damages arising subsequently, the award might be pleaded in bar, and with such a view (in a case like this) it would be desirable to set out what is allowed for present and what for future damages, but it is not necessary" (c). Some hardship might possibly arise if the proof, after many

Matters
included in
award.

Of and con-
cerning the
premises.
Set-off.

Arbitrator,
power of.

Contingent
damages.

(a) Abbott, C. J, 5 B. & C. 390; Worrall v. Deane, 2 D. P. C. 261, S. P.

(b) Reference was of cause, and all matters in difference, and it appeared the arbitrator told the defendant he had no cause of action, and he then prayed to be let in upon an equitable case, which the arbitrator allowed, and having heard the matter, he deemed it irrelevant, though he agreed with the law offered in support. Award recited, that having considered all the evidence and papers touching the matters in difference, arbitrator awarded that plaintiff had no cause of action, is sufficient. (Craven v. Craven, 7 Taunt. 642).

(c) Littledale, J., ib. 529.

Contingent
damages.

years, was necessary, but that observation would apply to every case where an award is made a defence to an action (a).

So where the reference mentioned a sum which was pleaded as a set-off, though not legally a set-off, yet being mentioned in the submission, it was held right to mention it in the award, and the Court would not reject it as a surplusage (b).

Performance of
award, demand
of.

When an award is made, if the party against whom the award is made, does not do all it requires of him, it will be a breach : if money be awarded to be paid, it must be paid, though the other has a counter demand (c).

In order to ground an application to the Court to place a

(a) *Brown v. The Croydon Canal Company*, 9 Ad. & E. 528.

(b) *Petch v. Fountain*, 5 Bing. N. C. 442. The plaintiff, and the defendant were both school mistresses, the defendant took a house of the plaintiff at 63*l.* a-year, and the plaintiff agreed that the defendant should board twenty-three persons at 21*l.* a-year, payments to be made at the times stated; three days after Midsummer the plaintiff sued the defendant for 15*l.* 15*s.*, a quarter's rent, and brought against her an action for slander; the defendant at the time for the board of the girls was owed 129*l.*, but which was not payable until the first of August, and which was pleaded as a set off with plea of general issue. Issue was joined on both pleas, the actions were referred by a Judge's order, including all matters in difference between the parties, and also including the claim of the defendant in her set off; in the first action, the arbitrator awarded 15*l.* 15*s.* for plaintiff, and disallowed the set off, and that the plaintiff had no grounds for her action of slander, and that plaintiff should pay to the defendant 129*l.* On application to set aside so much of the award as related to 129*l.* not as being due when pleaded, or on order of reference being made, it could not be treated as a set off, or as a matter in difference. "If defendant's demand had been strictly a set off, there would have been no necessity of making an express mention of it in the order of reference, it was claimed, whether well or ill founded, made by the defendant, and that claim by express words is a part of the order of reference: the award is correct." *Tindal*, C. J. (444).

(c) *Com. Dig. Arb. (G.)*

person in contempt for not performing an award, it is necessary to make a personal demand of the performance of those matters for which a discharge is to be given (a), but where it is a mere tender of deeds for execution, a personal demand need not be made, nor need there be a power of attorney for the purpose (b). Personal demand, when necessary.

If the award is, that the matter is to be delivered to several as executors, a demand by one is insufficient (c). Award to several executors.

Where the demand is by warrant of attorney, a copy of such warrant must be left with the person on whom the demand is made (d). Demand by warrant of attorney.

(a) A contract to purchase land was found by an award, which directed the defendant to perform the contract, and pay 1,652*l.* on the conveyance of the land by the plaintiff. A personal demand of performance was made, and notice given, that unless defendant complied in ten days, it would be construed as a refusal to perform the award. "Before the plaintiff can come here for an attachment, he must execute and tender a conveyance to the defendants, and ask for the purchase money awarded." (*Standley v. Hemmington*, 6 Taunt. 562, Gibbs, C. J.)

"An award directed a surrender of land within a certain time, and that plaintiff should pay the costs of award, the Court held it remained with the defendant to prepare the surrender, or give notice of attendance for that purpose on a certain day." (*Doe dem. Clarke and Another v. Sullwell and Another*, 8 Ad. & E. 649, Little Dale J., citing *Duke of St. Albans v. Shore*, 1 H. Bl. 274; *Halley v. Connard*, Cro. El. 517).

A personal demand of the matter awarded is necessary to warrant the issue of an attachment, but not on principle. (*Brandon v. Brandon*, 1 B. & P. 394. Eyre, C. J.)

(b) *Tibbett v. Ambler*, 2 D. N. S. 677, Patteson, J., citing *Kenyon v. Watson*, 2 Smith's Rep. 161, and *Lodge v. Posthouse*.

(c) The award was for the delivery of a deed to three executors, who were plaintiffs, and the demand was made on defendant by one of them, held insufficient. "You had better have a power of attorney from all three. It ought to be shown that defendant could know the demand was made by the authority of all to whom, by the terms of the award, he was bound to deliver the deed." (*Sykes and Others, Executors v. Haigh*, 4 D. P. C. 114, Tindal, C. J.)

(d) *Laughter v. Laughter*, 3 D. P. C. 284. Attachment, affidavit

Necessary
step.

The award must be shewn to have come into the hands of those from whom performance is sought, for the Court will not infer it for the purpose of placing them in contempt (a), that they had knowledge of the award, has been held sufficient (b).

Sufficient
answer to
breach alleged.

It is a sufficient answer to breach of an award, that the party had tried to do (in the judgment of persons of competent skill) all that they could to carry out the award, for no person can be bound to do impossibilities (c).

Finding upon
the issues.

The neglect of the arbitrators in finding distinctly upon all the issues submitted, has, perhaps, occasioned more awards to fail than any other deficiency, and so continued is the recurrence of applications to set aside awards for this particular neglect, that the Judges constantly make remark thereon, and have repeatedly drawn the attention of the

Direction as to
the finding of
arbitrator.

Bar thereto. As in the late case of *Stonehewer v. Farrar* (d), (one of the objections to which was, an imperfect finding upon the issues), Lord Denman, C. J., said, ("he hoped it would never occur again), and that all arbitrators would do wisely to find upon each issue what they think is proved thereon." So also in the case of *Morgan v. Thoma* s,

stated, demand had been made under and by virtue of a power of attorney, decided, &c. by a party by whom demand was made. *Per curiam*, a mere parol authority to demand the performance of an award, would be immaterial, and if a power of attorney is necessary for that purpose, it must be shown by legal evidence that that delegation of authority was properly executed, so a copy of a power of attorney should be left with the party on whom demand is made, in order to be satisfied that it is legally made.

(a) *Brander v. Penleaze*, 5 Taunt. 812.

(b) *Infra*, *Attachment*.

(c) *Hansom v. Boothman and Others*, 13 East, 26, Lord Ellenborough, C. J.

(d) *Supra*, p. 141.

(e) 9 Jurist, 92. Debt on several counts, pleas general issue, payment and set off; to a portion of the last plea; replication, statute

(which was an objection that the arbitrator had not decided upon all the issues). Pollock, C. B., said, "I think, in order to obviate difficulties of this kind, it would be advisable, in all cases where a cause is referred by an order of reference, to introduce into the order a condition, that it shall be sufficient for the arbitrator to award in favour of the plaintiff or the defendant generally, unless either party shall request him to find some particular issue or issues." Words to be inserted in future submissions.

The question, from the consumption of the time of the Court, by the continual repetition of the subject, has become a matter of importance, and it is therefore felt necessary to cite the whole of the authorities upon the particular point. The mischief, if mischief it be, has arisen out of the rules of Hilary Term, 2 & 3 Wm. 4 (a), which Rules of Hilary Term, effect of.

of limitations; after issue joined all matters, &c., by a Judge's order. The arbitrator awarded there was due and owing to the plaintiff from the defendant 60*l.* 9*s.* 7*d.* Alderson, B., "How can you say that *namquam indebitatus* pleaded to several counts does not involve *namquam indebitatus* to the first and every other count. It is a divisible plea, if so, how can you say the amount found by the arbitrator to be due to the defendant has reference to the first more than to the second or any other count?"

(a) *England v. Davison*, 9 D. P. C. 1053. Cause was shown against a rule for setting aside an award which had been obtained on the ground; first not being final as there was no finding on the second and last issues, and secondly, that the award does not contain any event by which the costs of the action in respect of the second or the last issue can be ascertained. Action was to recover the amount of an award; pleas, non-assumpsit; plaintiff did not give first information. Third plea to which there was a demurrer, and on which the plaintiff had judgment and payment of 5*l.* in satisfaction, which was referred; award was, plaintiff had no cause of action, and directed a verdict for defendant. Coleridge, J., said, "By the direction of the entry of the verdict, the defendant is entitled to the general costs of the action, and *by neglect to find specifically* upon the issues, it is impossible to ascertain what the taxation should be, and the materiality of the omission arises from the rule of Court, which distinguishes between the costs of the action, and the costs of the several issues." His Lordship doubted the case of *Dibden v. The Marquis of Anglesea*,

Rules of Hilary
Term, effect
of.

direct that those issues, which are found for either party, shall be taxed in their favour. Under the old rule of practice, a finding upon an issue which went to the whole of the action, entitled the party to the costs of the cause, and therefore the particular question could not arise.

Dibden v. Mar-
quis of Angle-
sea, rule in.

In the case of *Dibden v. The Marquis of Anglesea*, wherein the costs were to abide the event, Lord Lyndhurst, C. B., held that, "After finding that the defendant had not committed the trespasses, any inquiry into the truth of the special pleas, could only have been material with reference to the question of costs, if either wished to have a decision on the special issues; with that view, he should have requested the arbitrator to take that course. The arbitrator has substantially disposed of the matters referred to him." (a)

and distinguished the case of *Harrison v. Duckworth*, from that then under consideration on the ground that the costs were to abide the event of the award. He did not decide the case, but said "the state of the authorities left him at liberty to decide upon principle, and that he should therefore hold the award to be defective on the ground alleged, but if the defendant would allow the costs upon those issues (undecided) to be taxed for the plaintiff, the objection would be removed," which was acceded to.

(a) *Dibden v. Anglesea (Marquis of)* 10 Bing. 570. *Anglesea (Marquis of) v. Dibden and Another* (*this case was before the new rules*). Certain matters relating to rights of common were referred by order of nisi prius, verdict being entered for the plaintiff in each, subject to a reference; costs to abide event. Arbitrator directed a verdict for plaintiff in the first action, and in the second found defendants were not guilty of the trespasses, and directed a verdict accordingly. He took no notice of other issues, (pleas were in justification, rights of common on the *locus in quo*, and issue was taken on these asserted rights) and did not specify in which way the causes were to terminate; he ascertained and described the rights of the defendants particularly as to the asserted rights of common, but without making reference to the issues in the second action. On motion to set the award aside, it was considered the arbitrator had not disposed of the causes, that no judgment could be entered on the roll,

Duckworth v. Harrison (a) followed, in which the Court of Exchequer held, "that if the parties intended that the arbitrator should award distinctly upon each issue, they ought to have stated it: the arbitrator has decided the action, by saying that the plaintiff was not entitled to recover, and we think that the event of the award, must mean the event as to the action itself, and not as to the determination of the particular issues." Lord Abinger, C. B., in delivering the judgment of the Court, said, "the Court, at first, entertained some doubts upon the objection that the defendant had pleaded two pleas, and as the arbitrator merely found that the plaintiff had no cause of action, and had not decided upon each issue specifically, that he had not in fact determined the action." In *Duckworth v. Harrison*.

as the arbitrator had not ordered any entry of a discharge of the Jury as to the issues on the special pleas. *See text for Judgment.*

(a) *Duckworth v. Harrison*, 4 M. & W. 432. An action was brought in the Common Pleas at Lancaster, which by agreement was referred to three arbitrators, any two to award, with power to enlarge the time; they awarded that the plaintiff had no cause of action, and the plaintiff (then defendant said that his costs amounted to 58*l.*, which were allowed by the Court of Common Pleas at Lancaster, and for which action was brought; pleas, third, never indebted *modo et formā*; fourth, reciting said action was referred, that certain issues were joined, and stood for trial, and then set forth the declaration, which contained counts for money paid, money lent, and on an account stated, and that the pleas *nunquam indebitatus*, *modo et formā*, set off on an account stated, the replication took issue upon the first plea, and as to the second, plaintiff was not indebted *modo et formā*, on which the rejoinder took issue; plea continued that the arbitrator did not decide the said issues, and that they were matters in difference; replication, the issues were not in difference, and the arbitrators were not requested to decide specially upon the said issues; to the third plea demurrer; defendant joined in the demurrer, and demurred to the replication. Joinder in demurrer. Judgment was given for the plaintiff; nothing was said in the submission about the costs of the action, costs of the reference were to abide the event.

Gisborne v.
Hart.

Gisborne v. Hart (a), in which the question arose upon a demurrer, in giving judgment thereon, Parke, B., said,

(a) *Gisborne v. Hart*, 5 M. & W. 50. A cause was pending in the Court of Common Pleas at Lancaster, and by rule of said Court the cause was referred. Award, that plaintiff was entitled to recover the amount of the promissory note in the pleadings mentioned, and that the defendant should pay the same on a day and at a place named, with the costs of the action and of the reference; debt on award, alleging non-payment; pleas, did not make and duly publish award. Second plea set out pleadings in the cause referred to, from which it appeared, the declaration contained a count on a promissory note, and on an account stated for a larger sum, and, that the said promissory note was obtained by fraud; replication, traversing fraud, on which issue was joined, and also upon the plea of non-assumpsit. Replication then set out the award, verbatim, which corresponded with that in the declaration to the replication, there was a special demurrer on following causes, that it was not averred with sufficient certainty that any account was stated, or any proof thereof was given before the arbitrator, or that he awarded on any such supposed account stated. The plaintiff upon the trial of the issue in fact, proved his case by the production of the rule of reference, which defendant contended was insufficient, for plaintiff was bound to show what was the matter referred, without which, he failed to show the award was valid; the objection was overruled: plaintiff obtained a verdict with permission for defendant to move for a new trial; demurrer and rule for a new trial were heard together, the defendant had judgment on the demurrer, and Parke, B., said, "the award is clearly bad in not disposing of all the issues," the rule for a new trial was discharged. Lord Abinger, C. B., said, "We think there was sufficient *prima facie* evidence to support the declaration, we are not to intend facts for the purpose of vitiating awards, it might have been bad by evidence *dehors* tendered on the part of those impeaching it, in the same manner as when an application is made to set aside an award."

Norris v. Daniel, 10 Bing. 507. Reference of all matters in dispute to two attorneys; costs of action, and award, to abide event of award; declaration consisted of eight counts; arbitrators awarded amongst other things, that plaintiff had good cause of action on the third, fourth, fifth, sixth, and seventh counts, and that defendant should pay 5*l.* for damages, and no further proceedings be had. On rule to set aside the award, "It is not competent, unless where the costs are in the discretion of the arbitrator for him to omit deciding upon

"the award is clearly bad, as not disposing of all the issues."

In the case of *Rennie v. Mills* (a), which was an appli-
cation to the Court to send back a case to the Master, to
review his taxation, on the ground of there being no finding,
upon a special count in a declaration, which contained
matter very similar to that contained in another count,

*Rennie v.
Mills.*

the whole of the matters referred to him, so as to give them such a legal event as shall authorize the officer to tax the costs. He could not tax the costs for either as to those counts whereon there has been no decision." Award bad. Parke, J. (509).

(a) *Rennie v. Mills*, 5 Bing. N. C. 249. Declaration on special contract; plea, payment of 39*l.* into Court, on account of goods sold which plaintiff accepted in satisfaction of the count for goods sold, and as to all else non-assumpsit, denial of agent, and of delivery, and of delivery at the time agreed. The cause was referred; costs of the cause to abide event of the award. Award, the defendant at the commencement of the action was liable to pay the plaintiff 75*l.*, and which he directed to be paid minus the money paid into Court, and that the sleepers last (subject of special plea) named were the property of plaintiff. On this award, the Master taxed the entire costs of all the issues in favor of plaintiff; for review of taxation, it was urged, that by award it did not appear plaintiff had recovered anything in respect of the special count, and therefore the costs mentioned should not be allowed. *Contrà*, an affidavit showed that a witness was examined on the first count, and with the exception of payment into Court, the whole of plaintiff's demand was in respect of that count (250). "Looking to the award only, I do not see that arbitrator did not go into the matters in the special count or that his award is confined to the second count. First, breach of special count involves almost the same question as goods sold, and how are we to say the sum awarded was on the second count; the arbitrator must have looked into the special count for he awarded the last goods mentioned therein were the property of plaintiff and at his disposal, at the utmost it is ambiguous on the face of the award, there is no application to set aside the award. Why should parties go again before the Master whilst the ambiguity remains?" Tindal, C. J. (252). "I think it sufficiently appears on the face of the award that adjudication was on the special count." Vaughan. "The finding is not that defendant is indebted to plaintiff for goods sold, but that he is liable to make payment." Bosanquet, J.

Tindal, C. J., said, "I do not see that the arbitrator did not go into the matter contained in the first count, or that his award is confined to the second count."

Hunt v. Hunt

In *Hunt v. Hunt* (a), the award was bad, not only upon the ground of not finding upon all the issues, but because the arbitrators having no power, directed a *stet processus* to be entered; on the argument, it was urged such a finding as showed what was the arbitrator's intention as to the way in which the verdict was to be entered was sufficient, and Patteson, J., said he agreed thereto, it being in accordance with several preceding decisions, but he was not satisfied, upon the face of the award, that, that was the arbitrator's intention.

Bourke v.
Lloyd.

In the case of *Bourke v. Lloyd* (b), the Court of Ex-

(a) *Hunt v. Hunt*, 5 D. P. C. 442. Three causes were referred by order of nisi prius, a verdict being taken in one, the costs of each cause, to abide each respective award. The arbitrator awarded a *stet processus* in each cause, two specific sums were found for the plaintiffs in two actions, and in the third A. and B. were plaintiffs and C. and D. defendants. C. pleaded the general issue, and D. suffered judgment by default, therein a sum was found due by C., but nothing was said of D. though mentioned afterwards; the arbitrator says, the action by A. and B. against C. and D. should be no further, &c., the objection is, that the arbitrator has not awarded upon each specific issue, and that he was bound to do so, because the costs are to abide the event. It was assumed the arbitrator need not in terms adjudge upon each issue and that it was sufficient that he so expresses himself as to leave it clear, how the verdict was to be. "I agree to that answer, which is certainly the rule as laid down in several cases; the defendant was entitled to have the costs of his set-off, if proved, and of his plea in abatement; and if the money found due on the joint account was due from him only, he was entitled to a verdict for the misjoinder of D. and to all the costs of that action. On these grounds, that the arbitrator has not specifically, or by necessary implication adjudicated on each issue, and that he has exceeded his authority in awarding a *stet processus* on each, having no power over the costs." The award is bad. Patteson, J.

(b) *Bourke v. Lloyd*, 2 Dowl. N. S. 452. Debt, for money lent, paid, interest, and on account stated, pleas, *numquam indebitatus* and

chequer held agreeably with its prior decisions, that to make it incumbent upon an arbitrator to find upon each issue, words ought to have been introduced into the order of reference, to shew he was bound so to find, or that the costs were to abide the event of the award. In the case of *Williamson v. Lock* (a), the above decision was much dis-

*Bourke v.
Lloyd.*

*Williamson v.
Lock.*

payment; reference by Judge's order, costs of cause to abide event of the reference, &c. in the discretion of the arbitrator. Award, plaintiff had good cause of action, and that defendant should pay 20*l.* and costs, but it did not find specifically upon each issue. Lord Abinger, C. B. declared the judgment of the Court (speaking of *Davison v. England*), his Lordship said, "the Court took time to consider, in consequence of the judgment of Coleridge, J., which was supposed to militate against the doctrine more than once laid down by this Court, *that where an action is generally referred to an arbitrator and the costs of the cause are distinctly to abide the event of the award, and there are several issues joined he ought to award upon each issue in order to decide which are the costs which ought to abide the event*, (after noticing the judgment of Coleridge, J.), and speaking of *Duckworth v. Harrison*, his Lordship continued in delivering the judgment of the Court, "I stated that which I still adhere to, that *to make it incumbent upon the arbitrator to find upon each issue*, words ought to have been introduced into the order of reference to show he was bound so to find or that the costs were to abide the event of the award. We are of opinion that the cases must be adhered to, and that, where an action is referred to an arbitrator, and the costs of the action are to abide the event of the award, each issue must be found specifically by the arbitrator, otherwise the Master has no rule for proceeding to tax the costs." Award set aside.

(a) *Williamson v. Lock*, 9 Jurist, 349, (second count). The declaration contained three counts, to one of which, five pleas were pleaded, any of which was an answer to the whole cause of action contained in that count. Cause was referred; terms of reference were costs of action, and of reference, were to abide the event; the arbitrator found that the plaintiff had a good cause of action on the second count, and awarded a sum thereon as damages, on the other two counts, that plaintiff had no cause of action; a rule had been obtained to set aside award, on the ground that the arbitrator had not decided each of the issues separately; which was dismissed. On an application to the Master to tax the costs, the plaintiff consented that the defendant

Observations
upon the prin-
ciples men-
tioned by the
cases above.

cussed, and the rule to review the taxation was directed to be framed in such a way that error might be had thereon. By which, if brought, the question will be finally settled.

The only decisions by a full Court appear to be those delivered by the Court of Exchequer, and which, excepting the observation of Parke, B., in *Gisborne v. Hart* upon the argument of the demurrer therein, are uniform.

The suggestion of Pollock, C. B. (a), appears to be one calculated to prevent much confusion, and is entirely in accordance with the prior decisions in his Court, and recurrence being had to the principle upon which an award is founded, will be found sound. The inconvenience so much complained of is not occasioned by any thing which really militates against the rights of either party, but by a technical objection founded upon the Reg. Gen. of Hilary Term, a matter which appears wholly beside the intention of the parties. When costs are directed to abide the event, it is submitted the event in the contemplation of the parties is not a distinct finding upon each issue, but such an event as shall settle the dispute between them, and which is done by such a general finding as goes to the whole matter of the difference, for it is shewn by the conduct of the Courts that the question is not one material to the validity of the award, but merely one of costs, by their (the Courts) allowing the award to stand, upon the successful party agreeing, that the

should have all the costs on the issues found for him; but to which the Master (Bunce) refused to accede, considering there should be a finding upon each issue separately. A rule nisi was granted for the defendant to show cause why the Master should not tax the plaintiff's costs, on his allowing the defendant the costs of the issues found for him; the rule was so moulded that the doctrine laid down in *Bourke v. Lloyd* might be brought before a Court of Error, Williams, J. made the rule absolute, that the question might be raised and finally settled.

(a) *Supra*, p. 153.

costs of the unfound and immaterial issues shall be taxed, for his opponent and set off against the general costs of the cause.

Observations upon the principles elicited from the cases above.

The rule of Hilary Term is a most essential and important one, as preventing expense and inconvenience, still, it is considered to be a narrow application of the principles which govern awards, to say, that they shall be circumscribed by it, for if it was desirable to find on any particular issue, for the purpose of giving effect to the operation of the rule, or from a supposition, that such a finding materially affected the justice of the case, or other reason, the power to do so, remains with the parties, for they could request the arbitrator to find thereon, and it could not be urged that their not having done so resulted from an ignorance of the law, such an assumption in this case would be rebutted, not only by the presumption of knowledge, which is a maxim of law, but from the fact, for the proceedings before arbitrators are rarely, if ever, conducted by the parties themselves, but by their solicitors, and in many cases by counsel. When a lawyer is concerned, it must be presumed, without a strain upon construction, or even common sense, that they have a thorough knowledge of those rules and principles which govern awards, therefore their silence, it is considered, is an evidence against them, for it shews their acquiescence in any general finding of the arbitrator; or they would have interfered to prevent such a finding as they knew, would involve future expenses and inconvenience.

These observations of course will be understood to relate to cases wherein the costs are in the discretion of the arbitrator, and where the issues found, go to the whole matter in dispute; such a general finding of the arbitrator is, in other words, saying the plaintiff has proved his case, and which has not been impugned, by the pleas placed by the defendant on the record, and that even though the pleas are repugnant (a).

General finding of the arbitrator, what.

(a) *Vide* England v. Davison, et Duckworth v. Harrison, *supra*, in notis.

General finding of the arbitrator, what.

In a case where it is directed that the costs of the cause shall abide the event of the award, a more particular rule might justly hold, for there, the parties make the costs a matter in dispute, by mentioning them in the submission, and it may, in such case, be necessary for the arbitrator to adjudicate thereon, for unless he does, and upon each issue, the intention of the parties in referring, is not carried out, for the costs of the issues were particulars in dispute.

Presumed finding in error.

It is apprehended the rule laid down by the Court of Exchequer in *Bourke v. Lloyd (a)*, is that which will be adopted by the Court of Error, as it appears to be one which not only accords with the written assent of the parties, as evidenced by the submission, but agrees with the principles which govern awards: the Court of Common Pleas held that the Court would not go about to find facts for the purpose of invalidating an award; the question in that case, was whether the arbitrator had found upon a special plea. The Court supported the award on the ground that it did not appear from the face of the award the arbitrator had not (*a*).

Such confusions as those above treated of would be avoided by moulding future submissions in accordance with the *suggestions of Pollock, C. B.*, or paying attention to the direction of *Lord Denman, C. J.*, in the case of *Stonehewer v. Farrer (b)*.

Withdrawal of a plea by consent.

Be the rule of construction as to the non-finding of any particular issues what it may, it does not apply to a case where the parties withdraw a plea by consent, in a case (*c*),

(*a*) *Supra*, p. 158.

(*b*) *Supra*, p. 152, *et seq.*

(*c*) Trespass *quare clausum*. The fourth plea was withdrawn by consent, costs of cause and reference were to be in the decision of the arbitrator, who was to hear and decide on the costs in the cause, as though the fourth plea remained; the arbitrator ordered a verdict to be entered for the defendant on the third issue (which was a justification), and for plaintiff on the first and second issues, and that the plaintiff should pay the defendants their costs in the cause, and of

wherein the arbitrator had a discretion over the costs of the award, and the arbitrator was silent upon the plea withdrawn, it was held the arbitrator meant that each party should pay his costs of that issue. Withdrawal of a plea by consent.

The finding of an arbitrator may appear inconsistent, yet, if such finding be in accordance with the terms of the submission, it is sufficient (a). Finding upon the issues, sufficiency of. So an arbitrator may find upon the issues distributively or not, as he pleases (b).

It is not necessary for the arbitrator to find the issues in any particular form of words, and if there be no other matters referred beside the cause or causes he may find in the language of the issues (c).

the order and reference; the arbitrator's silence as to the issue withdrawn, shows he did not mean to give the costs thereon to either party, and the meaning was, that the defendant should have the costs, in the same way as he would if the issues were similarly found on a trial. (*Allenby v. Proudlock and Stotter*, 4 Adol. & Ellis, 330, Lord Denman, C. J.)

(a) *Williams v. Mouldsdale*, 7 M. & W. 134. Action for use and occupation, plea *nunquam indebitatus*, and set off; a verdict was taken for the plaintiff subject to a reference, which was as to whether verdict should stand, and for what amount, or whether it should be entered for defendant. Arbitrator certified it should be vacated, and entered for the defendant on both issues, motion to set aside award for inconsistency, as to the finding of the *nun. indeb.* and the set off, was inconsistent. The arbitrator has power to enter the verdict upon each issue, and having done so, his finding is conclusive. Parke, B. (136). Rule refused.

(b) *Bird v. Penrice*, 8 D. P. C. 775. Declaration contained a count for horse keep, and a count for goods sold, defendant pleaded except as to 150*l.* 14*s.* 8*d.* non-assumpsit, and as to that sum payment in satisfaction, on reference arbitrator found; on first issue; verdict should be entered for plaintiff, and on second issue, as far as relates to the said 150*l.*, "I find for defendant, and as to the second, of said issues verdict for plaintiff, and assessed damages for plaintiff 14*l.* 4*s.* 9*d.*, being the balance due to him." To set aside, plaintiff having been successful as to part of first issue only, arbitrator should have found it distributively as he did the second. Court thought the award sufficient, (776).

(c) *Allen v. Lowe*, and *Lowe v. Allen*, 4 Q. B. 68. The first cause

Finding upon
issues without
damages.

It is not necessary for the purpose of giving validity to an award for the arbitrator to give damages upon the issues he finds, in favour of one, or the other of the parties, as where there is an issue which goes to the whole demand he may find upon the other issues without damages (a).

General finding
of arbitrator.

Where there are several pleas on the record, one of which is a set-off and another payment, and the arbitrator finds generally that nothing is due, and it is proved that no evidence was offered upon those pleas, such award entitles the plaintiff to a verdict thereon (b). But where the finding of the arbitrator is such that the Court cannot comprehend the meaning the arbitrator had in view, in such case they will not interfere (c).

came on for trial at Liverpool, verdict was taken, with damages, by consent, subject to a reference, the other cause pending was also referred; the first was for work done as an attorney, the other for negligence, &c.; the arbitrator reduced the amount of the verdict in the first cause, and in the second proceeded as follows, following the language of the pleadings on the first issue, that the said Edward Allen did promise in manner and form, &c.; and on the second issue, that the said Edward Allen did do all that was requisite and proper in reference, &c., and that he did not conduct, &c. in manner and form, &c.

(a) *Savage v. Ashwin*, 4 M. & W. 530; *Warwick and Another v. Cox*, 1 D. & L. 986, S. P.

(b) *Woolfe v. Cooper*, 6 Dowl. 617, Tindal, C. J.

(c) *Wood and Another, Assignees v. Duncan*, 7 D. P. C. 91. The facts were as follows: assumpsit, money paid, money had and received, interest, and money due on an account stated, alleging the promises to have been made to the bankrupt; then there were another set of counts, laying the premises to the plaintiffs as assignees; pleas, first, as to the first four counts, except as to the sum of 239*l.* 13*s.* 4*d.*, parcel, &c. non-assumpsit; secondly, to the whole declaration that A. and B. were not bankrupts; thirdly, to the first four counts a set off for money due from A. and B. before their bankruptcy; fourthly, to the said counts payment; fifthly, to same, &c., release; Sixthly, as to 80*l.* 12*s.*, parcel of the first four counts, payment by two promissory notes; lastly, to the last set of counts a

When the arbitrator gives general damages, it means that the damages are assessed upon all the issues on which they could be (a).

A hypothetical finding of the issues is sufficient to entitle the parties to the costs of those issues (b). Hypothetical finding of issues.

An arbitrator has no power to direct a verdict to be entered, unless, he is expressly authorized, to do so, by the submission, and which authority must be conferred in distinct terms for such direction by the arbitrator, unless authorized, would render the award bad (c), and where the authority is omitted; the presumption is, that the parties intended the proceedings should be by attachment for non-performance of the award (d). "Where a verdict is taken at the trial, subject to a reference, it means that the parties consent that the arbitrator shall mould the verdict, which Verdict, power to find.

similar plea of payment. A verdict was taken at nisi prius, with damages, subject to an award, &c.; the arbitrator directed the verdict for the plaintiff to be vacated, and that a verdict should be entered for the plaintiffs, on the first, second, fourth, fifth, and sixth issues, and for the defendant on the third and last.

(a) *Hobdell v. Miller*, 6 Bing. N. C. 292.

(b) *Beaufort (Duke of) v. Welsh*, 10 Ad. & E. 527. Action was for alleged neglect on a special retainer of the defendant to superintend, &c., with counts for money had and received, and account stated. Pleas; first, non assumpsit; second, denial of retainer; third, as to part of the first count, did use care, skill, &c.; fourth, and as to the other part, did use care and skill in examining bills, &c.; fifth, as to money counts, set off. Award directed the verdict should be entered for the defendant; that the first, second, and fourth issues should be found and entered for him; that the third and fifth should be entered for the plaintiff. On objection for inconsistency, Lord Denman, C. J., held there was no inconsistency, the award shows there was no contract, but if there was one, then one of the alleged breaches of it was proved.

(c) Citing *Donlan v. Brett*, Lord Denman, C. J.; *Hayward v. Phillips*, 6 Ad. & E. 128.

(d) *Tindal, C. J., Hutchinson v. Blackwell*, 8 Bing, 331.

Verdict, power
to find.

has been taken, and that the verdict so moulded by him, shall be taken to be the verdict which the jury have found: for this purpose, it is always taken at the highest sum for which it is supposed that the damages in any event can be awarded; generally for the amount of the damages laid in the declaration: by such consent rule, it is never understood that the arbitrator is at liberty to award damages to any extent he pleases; the law will not therefore raise an assumpsit to pay any larger sum, than that which the arbitrator has power to award, and having awarded *one entire sum* beyond his authority, no assumpsit can be raised to pay that, or any smaller sum" (a). In a late case where the arbitrator found that the plaintiff was not entitled to, and that no money was due from, either of the parties, for any matter in difference, the Court said, the meaning of the word verdict in the submission is, that where a verdict has on reference been entered for the plaintiff, with power for the arbitrator to alter it, that if no debt be due to the plaintiff, then the verdict shall be entered for the defendant upon all the issues (b).

Entering
verdict, mean-
ing of.

Where the arbitrator directed a verdict to be entered for the plaintiff, and awarded a certain sum as damages, without stating he made his award, of and concerning the premises. It was held, that it appeared sufficiently, upon the face of the award, that the arbitrator had decided all the matters referred to him, had he used the words *de premissis*, there would be no doubt: the award is a general verdict for the plaintiff's damages, the meaning of which is that he found that sum due, after settling the accounts (c). Where the arbitrator directed a verdict to be entered, and assessed

(a) *Vide supra*, Le Blanc, J., Lord Ellenborough, C. J. concurred; *Bonner v. Charlton*, 5 East, 145.

(b) *Waddle and Another v. Downman*, 1 D. & L. 560.

(c) *Gray v. Gwennap*, 1 B. & Ald. 105.

damages 20*l.*, and ordered the defendant to pay the costs of the reference, the Court held the direction of the entry of the verdict, for the sum is tantamount to directing that that sum of money should be paid (*a*).

In cases where there is no verdict entered, or directed to be entered, but a distinct sum found, the Court will not proceed thereon summarily, for the defendant is not in contempt, until it be shown he has disregarded some order in the award (*b*), and it is necessary there should be an order to pay, to entitle a person to an attachment (*c*), therefore the only remedy in such case is by an action upon the award (*d*).

Where the defendant pleaded the general issue, payment and a set-off, and on the plaintiff failing to prove his cause of action, the arbitrator directed a general verdict to be entered for the defendant, and it was objected that no evidence had been offered upon the pleas of payment and set-off. Tindal, C. J., said, "if no evidence has been offered upon the pleas of payment, and set-off, the verdict may be amended upon application; for as the whole cause was referred with power to enter up a verdict, that is *secundum subjectam materiam*, and as the arbitrator is put in the place of the jury he may find in the same way that a jury has power to do (*e*).

Where a cause and all matters were referred, and the arbitrator award damages upon the first issue 1*s.*, and on the second damages 13*s.* 4*d.*, it was objected that as there was but one breach, that thereon, the verdict should have been entered, but as the award stood, it could not be.

No order to pay.

Finding of an arbitrator when a verdict is directed to be entered.

Assessment of double damages on one breach.

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- (a) Cartwright and Blackworth, 1 D. P. C. 492, Parke, J.
 - (b) Edgell v. Dallemore, 3 Bing. 64; Scott and Another, Assignees v. Williams, 3 D. P. C. 508, S. P.
 - (c) Leaward v. Howey, 7 D. P. C. 318, Parke, B.
 - (d) Mallen v. Smith, 7 D. P. C. 394.
 - (e) Woof v. Hooper, 4 Bing. N. S. 449.

Assessment
of double
damages on
one breach.

Tindal, C. J., said, "why could not the verdict be entered for 14*s.* 4*d.*, and it was held (by the Court), that to set aside the award on this ground (award of damages on both issues for a single breach), would be straining to get rid of the justice of the case (*a*).

Verdict for
more than laid
in the parti-
culars of de-
mand.

Verdict for
greater sum
than laid in the
declaration.

Application to
the Court to
enlarge the
verdict.

Where the particulars of demand are less than the damages, for which the verdict was taken, the Court will set aside the award, unless the plaintiff will consent to reduce the verdict to the claim contained in the particulars (*b*). In another case, where matters in difference were referred with the cause, and a verdict was taken by consent, and the arbitrator found a larger sum was due, and directed a verdict to be entered therefore, and which exceeded the verdict laid in the declaration, the Court reduced the verdict to the amount mentioned in the declaration, and allowed a judgment, &c., to be sued out for the remainder, and Mansfield, C. J., intimated he was not clear that the arbitrator could not have applied to the Court to enlarge the verdict (*c*).

(*a*) *Smith, Administratrix v. Festiniog Railway Company*, 4 *Biag. N. S.* 23.

(*b*) *Kenrick v. Phillips*, 7 *M. & W.* 415. Reference; verdict was entered by consent for 500*l.*, the damages laid in the declaration, the claim in particulars was 431*l.* 6*s.* and interest. The submission contained a power for the arbitrator to proceed *ex parte* in case either did not attend; the defendant did not, and the arbitrator proceeded *ex parte*, and awarded that the verdict should stand for the amount for which it was entered on the motion to set aside the award. The Court appeared divided, but ultimately a rule was granted to set it aside unless the plaintiff would consent to reduce it to the amount contained in the particulars of demand. (417.)

(*c*) *Prentice v. Reed*, 1 *Taunt.* 151. Verdict by consent, damages 500*l.*, subject to award of arbitrator, who was to enter a verdict, and settle the matters in difference, and direct what should be done by either party respecting the matter in dispute, and if he was of opinion V. had no right to seize the crops, &c.; V. was to be at liberty to retain the amount which plaintiff was to have paid A., but the value

Where a verdict is taken at *Nisi Prius*, subject to a reference, but through some mischance no award is made, the first verdict must be got rid of before the parties proceed again to trial (a). The proper course in such case is to apply to the Court for leave to try the cause, notwithstanding the former verdict, but which may be waived by the consent of the parties (b).

Verdict at nisi prius and no award made.

beyond that price, and the damages were to be paid to the plaintiff, and a provision that if A. recovered more from the plaintiff than the amount of such valuation, the difference should be repaid by the plaintiff out of the money, if any awarded to him. The arbitrator found, that the defendant was indebted to the plaintiff in 615*l.*, and directed the verdict to be altered to that amount; a rule was obtained to reduce the verdict to 500*l.*, and on payment of the award, satisfaction to be entered upon the judgment. "I am by no means clear the arbitrator might not have directed an application to the Court to enlarge the verdict to 615*l.*, and that the defendant should consent; here the verdict is a mere form, and in substance an agreement between the parties." (157). Lord Mansfield, C. J., *cur. ad vult.* "It would be a gross fraud to alter the award to 500*l.*, but in point of form, defendant is right; the Court directed the judgment should be altered to the sum of 500*l.* damages only, and that plaintiff should be at liberty to sue out execution for 270*l.* 4*s.* 9*d.*, the sum which remained after deduction, 344*l.* 15*s.* 3*d.* from 615*l.*" (*Vide Bonner v. Charlton*).

(a) *Evans v. Davies*, 3 D. P. C. 786. Motion, why verdict should not be set aside for irregularity; by affidavit it appeared the cause originally came on for hearing in 1833, and was referred; verdict taken for 50*l.* costs 40*s.*, subject to award of arbitrator; no award was made, and usual notice of trial was given for 1835. Defendant's attorney was absent from home until two days before assizes, and had not sufficient time to prepare; it was moved on two grounds, first, that as no proceedings had been taken for four terms, a term's notice of trial was necessary; secondly, as verdict had been entered for plaintiff, it should have been got rid of before proceeding to trial, the proceeding is irregular. The first verdict should be rid of before proceeding to trial. Lord Abinger, C. B. (789).

(b) *Hall and Others v. Rouse*, 4 M. & W. 24. Reference by order of nisi prius, which was obtained from the associate, who omitted to deliver it to the arbitrator until after the expiration of the time within

Verdict, award
not made until
several terms
after.

When a verdict is taken at *Nisi Prius*, subject to a reference, and the award is not made until several terms after. It is not a matter of course, that the judgment should be entered up as of the term next after that at which the verdict was found, but such proceeding is a matter of special application to the Court, as in the case of a verdict, subject to a special case (*a*). Where there were several issues in a replevin suit was referred at *Nisi Prius* to an arbitrator, who found some of the issues for the plaintiff, and some for the defendant, but ordered no verdict, or judgment to be entered, the Court of Common Pleas, on motion, refused to enter one (*b*).

Verdict for
larger amount
than given at
nisi prius.

Where the cause, and other matters are referred, and the verdict is insufficient to cover the whole amount found, the arbitrator may enter the verdict for the amount found in the cause, and the remainder for the matters in difference, so expressing it in the award, and though under the verdict the plaintiff might not have his remedy for the whole sum,

which it was to be made, the parties met before the arbitrator, but the defendant refused to proceed. It was stated the cause would be set down again for trial; and the plaintiff's attorney, under 1 Wm. 4, c. 22, s. 4, obtained an order to examine a witness who was very ill upon interrogatories, which was done, and defendant's attorney attended and cross-examined witness. No award was made, and no judgment entered on record on former verdict. Notice of trial was given, and the cause was tried, the defendant's counsel objected to the proceedings, the cause being pressed on, was taken as an undefended cause. Rule was obtained to set aside second verdict. (25).

"I am of opinion the rule ought to be absolute for a new trial, the order of reference is an admission that there is a verdict, and which must be rid of before cause is again tried. An order to examine a witness upon interrogatories would not necessarily be overruled, though a former verdict still stood, being made prospectively to a new trial in case verdict should be set aside. Examination of witnesses by defendant's attorney was no waiver." (27). Parke, B.

(*a*) Parke, B., Brooke and Another, Assignees of *Smith v. Fearn*s.

(*b*) *Grundy v. Wilson*, 7 Taunt. 701.

found by the arbitrator, yet for the amount found upon the matters in difference, he would have his remedy upon the award (a).

When, by order of *Nisi Prius*, a verdict was entered, with power for the arbitrator to reduce, &c., or direct a nonsuit, it was held, that if the arbitrator directed a nonsuit to be entered, he should nevertheless decide the matters in difference, and that if he did not, his decision was not final, and therefore bad. Parke, B., dissented, and said, "he did not see any difference between the cause, and the matters in difference in a cause; they depend altogether upon the issues raised in the cause; the arbitrator is to decide upon the matters in difference in the cause, but the parties have given him power to dispose of the cause, by entering a nonsuit; therefore, by the express contract of the parties, that is a good and valid end and determination of the cause, and therefore of the matters in difference in the cause." (b)

Power to vacate verdict and direct nonsuit.

It would seem, that, as a reference is a matter which originates in the will of the parties, and the submission or order of *Nisi Prius* is the declaration of that will, the terms therein contained declare their intentions. If those intentions are not in conformity with the usual custom, it can scarcely be said that for that cause any finding in the terms of the rule shall not be binding upon the parties.

It is presumed, that when an arbitrator is selected, it is with the supposition that he is competent to carry out the intention of the parties, and yet it is often found, that through a mistake as to the law, error in calculation, excess of authority or ambiguous phraseology, the ends of justice are in a measure defeated, and in the latter cases, the parties, with respect to the matters in difference, are in the same situation as when they consented to refer.

(a) *Supra*, p. 169.

(b) By the terms of the order, the arbitrator was to be at liberty to reduce or vacate the verdict, or to enter a verdict for the defendant, or direct a nonsuit to be entered, &c. (*Wild and others v. Holt and Another*, 9 M. & W. 162, *vide supra*, p. 197).

Power to
vacate verdict
and direct
nonsuit.

In the case in question the cause was the only matter in difference between the parties and the entry of the nonsuit disposed thereof. The cause and the matters in difference in a cause must, as his Lordship said, be essentially the same, for unless there was a difference between the parties the action would never have been brought, and generally the entry of a nonsuit is a determination of the action, either from inability on the part of the plaintiff to establish his right—fear of incurring additional expenses—or other such reason.

It is true the legal effect of the nonsuit is to end the particular proceedings pending without touching the cause of the action, and to indemnify the defendant for the expenses of his defence, and though the proceedings (from whatever cause the nonsuit is directed) have to be commenced *de novo*, still it is the same action, *i. e.*, the matter of the action is the same, the writ and pleadings being mere technicalities for presenting the facts in a tangible form to the Court. Surely it will be allowed that the parties to the submission can present what facts they please to agree upon for the decision of the arbitrator, and those facts might as well be the technicalities (*i. e.* the correctness of the proceedings, and the conclusiveness of the evidence) as the substance of the action—and in many cases such a mode might be particularly adapted for the administration of equity between the parties, which is the very intention of a submission to a reference. Supposing the nonsuit to have been directed from an insufficiency of legal proof before an arbitrator, (where it must be recollected there may be meeting after meeting, and it must be supposed that all the evidence which it was in the power of the plaintiff to bring, would be brought;) in such a case, the entry of a nonsuit would be tantamount to the discontinuance of the action, and the settlement of the matters in difference; or, on the other hand, it might be, that the plaintiff being aware of the difficulties of his case, and what was the nature of the evidence he could bring, chose this particular mode of drawing

up the rule, for the purpose of testing the matter, leaving the case open for a future time, that the right of the parties, if necessary, might be placed beyond doubt.

Power to
vacate verdict
and direct
nonsuit.

Besides, it is conceived that general principles do not apply, when the parties have themselves pointed out a particular mode of carrying out their intention; the giving permission to enter a nonsuit, must have meant something or nothing, and it would have been an anomaly to first direct a nonsuit, and then say that the plaintiff has no cause of action; the cause might exist, and be reduced to a moral certainty, and yet be incapable of strict legal proof (a).

It, in such a case, would seem to be a contradiction in terms, for the arbitrator to say, a person has no cause of action, and that he has a cause, but which he has not adduced in accordance with the rules of law.

The usual intention of a submission to arbitration, it is admitted, is the ending of the differences of the parties, and if that intention fails, through the use of wrong terms, it is right that those so consenting should suffer, for it is contrary to every rule of right, to say, *that* a person shall point out a particular mode by which he would have his right decided, and when it is decided in accordance with that mode, and found unfavourable, to say, "it is true I selected that mode, but the law says it was an improper one, and, therefore, I choose to abide by the decision of the law, acting in accordance with its usual rules of construction.

An arbitrator cannot, in any case, award a *stet processus*, unless he has power over the costs (b); and where he does so without authority, his award is bad, and will be set aside; but where he finds upon all the issues, and then directs no

Stet processus,
award of.

(a) *Vide supra*, *Entry of Nonsuit*.

(b) *Hunt v. Hunt*, 5 D. P. C. 442, *Patteson, J.*

Stet processus. further proceedings should be had (*stet processus*), in that award of. instance, the latter part may be severed, for the finding upon the issues, is an event in the cause, and may be left to take effect (a).

Two actions, award of a gross sum and stay of proceedings. Where there are two actions, and the arbitrator directs the proceedings to stay, and awards a gross sum as damages, it is sufficient (b). An award, (in a case where a prosecution for a misdemeanor arose out of the same cause,) which directed a verdict of acquittal to stand, and each party to pay his own costs, and that the actions be discontinued, was held to imply a *stet processus*, and was sufficient (c).

(a) Ward v. Hall, 9 D. P. C. 612, Coleridge, J.

(b) Wynne v. Edwards, 2 D. & L. 975, Pollock, C. B.

(c) Blanchard v. Leley and Others; Rex v. Blanchard, 9 East, 496.

SETTING ASIDE AWARDS.

The time for setting aside an award, is regulated by the statute of Wm. 3, (9 & 10 Wm. 3, c. 15,) but that statute only applies to awards made in accordance with its directions, Time for setting aside an award. in all other cases they fall within the rule of the common law, though the Courts, as far as possible, assimilate the practice. Before this statute, the Court had no power to set aside the award of an arbitrator, even for corruption, the only remedy against such an award, was by application to the Court of Chancery, usually the Equity side of the Exchequer (a); now, by the statute, the Court wherein the rule was obtained can set aside the award on such grounds, and it is the practice to interfere in other cases also (b); but the application must be made within the term next after that within which the award was made, and published to the parties (c). Before this statute, the parties could refer by a Judge's order, which might be made a rule of Court, without reference to any statute, and in such case it

(a) *Veale v. Warner*, 1 Saund. 327.

(b) *Supra et infra*.

(c) *Zacchary v. Shepherd*, 2 T. R. 781. "The motion (upon 9 & 10 Wm. 3, c. 15, s. 2) must be made before the last day of the term after the award. Lord Kenyon, J. (782).

The next term meant by the statute has reference to that which is generally in legal proceedings considered to be the term. In law Essoign day is the first day of term, and all legal acts relating thereto, therefore an award made after Essoign day may be moved to be set aside on the term following. (*In re Burt*, 5 B. & C. (668). *Lowndes v. Lowndes*, 1 East, 276.)

The statutes 9 G. 4, and 1 Wm. 4, c. 70, s. 6, abolishes the Essoigns day, and the terms commence and date from certain and specified days, and are not now moveable with the feasts, as theretofore.

would appear the statute is only declaratory of the common law, as it existed in certain cases before (a).

Submission by deed and parol.

When the submission was by deed, the Courts of Common Law had no power to set aside an award, nor have they now, unless it contains a clause that the submission may be made a rule of Court (b): so also where the submission is verbal (c). (In these cases for corruption, application must be made to Equity for relief.)

References by order of nisi prius.

References by order of Nisi Prius are not regulated in accordance with the statute, but by the rules of the Court directing the order (d), *i. e.*, within the time limited for moving for a new trial (e). Lord Tenterden, C. J., said, "the Court might not rigidly insist upon a compliance with that rule, if any sufficient grounds for asking the indulgence were shown;" and this rule holds though all the objections are fair, and apparent upon the face of the award (f). Where the defendant intimated to the plaintiff that he intended moving to set aside the award, the plaintiff thereon allowed a term to elapse, and then moved, the Court held that such a statement was no sufficient reason for delay (g). When matters in difference are included, then the application need not be within the first four days (h). Where the submission contains an agreement to make it a rule of Court, it must be made so in accordance therewith, in

Submission containing power to make it a rule of Court.

(a) *Lucas v. Wilson*, 2 Burr. 701; *Aston v. George*, 2 B. & Ald. 397.

(b) *Aston v. George*, *supra*.

(c) *Ansell v. Evans*, 7 T. R. 1.

(d) *Syngé, Executor v. Jervoise*, 8 East, 465.

(e) *Rawstom v. Arnded*, 6 B. & C. 629; *Lyng v. Sutton*, 5 D. P. C. 40, S. P.; *Hayward v. Phillips*, 6 Ad. & Ell. 123.

(f) *Sell v. Carter*, 2 D. P. C. 245.

(g) *Manseer and Heaver*, 3 B. & Adol. 295.

(h) *Hayward v. Phillips*, 6 Ad. & E. 128; *Moore v. Butten*, 7 Ad. & E. 599, S. P.

order to empower the Court to interfere (a), but it is not necessary that it should be made a rule of that Court wherein the action referred is brought; it may be made a rule of any other of her Majesty's Courts of Record, but that Court alone can interfere, whereof the submission is made a rule (b), which may be done even after the award is made, though the opposite party have filed a bill in Equity, to restrain, or set it aside (c).

Submission containing power to make it a rule of Court.

When an award is sought to be set aside for extrinsic matters, application therefore should be made as soon as possible, and when the facts are fresh in the minds of the parties, but when bad upon the face of it, it carries with it those circumstances which go to its destruction, and therefore they may be taken advantage of whenever the opposite party attempts to enforce it; whether by an attachment, or by an action (d); but in such case, the defect must appear upon the face; to show such matter, affidavits will not be allowed (e); (e. g.) to show what particular charges have been allowed (f), or that the defendant is a returned convict,

To set aside award for extrinsic matters.

(a) *Chapman v. Vaughan*, 1 Bing. 87.

(b) *Lambert v. Hutchinson*, *supra*, p. 82; *Kirkus v. Hodgson*, 3 Moore, 66. Reference at nisi prius, rule nisi, that a verdict might be entered for 40*l.*; affidavit stated a verdict for 5*l.* had been entered, subject to the award of an arbitrator, who refused to make his award. The reference to the arbitrator merely gave him a discretion to determine whether plaintiff was entitled to 5*l.*, or a smaller sum. Held, Court could not entertain the motion until made a rule of Court.

(c) *Smith v. Symes*, 5 Mad. 75.

(d) *Kerr v. Jeston*, *supra*; *Pedley v. Goddard*, 7 T. R. 73.

(e) *Holland v. Brooks*, 5 T. R. 162; *McArthur v. Kemble*, 2 Ad. & E. 56, S. P.

(f) *Genshaw v. Germain*, 11 Moore, 1. Action by an apothecary; arbitrator awarded 77*l.*, and allowed charges for attendance; on motion to set aside, because if action had gone on, plaintiff being an apothecary, could not have recovered. Held: award is conclusive on the face of it, and there being nothing there to warrant objections,

had the plaintiff known it, he would not have entered into the submission (a), or if the plaintiff had claimed no more than had been awarded, he should not have objected (b).

Setting aside awards for other causes than corruption.

The Court will set aside an award for other causes than corruption, but in all cases the motion must be made before the last day of the term next after that in which the award is made (c).

Statement of case for the opinion of the Court.

Where a case was stated for the opinion of the Court, the judgment of the Court should be moved for within the time allowed. Parke, B., said, "it was in effect an application to set aside the award of the arbitrator, he has found the verdict should be entered for the larger sum, unless the Court interferes, and to attain that end, the motion should have been in time" (d). The Courts will not, except under

affidavits could not be received, to show what particular charges have been allowed.

(a) Affidavit that, defendant was a returned convict, and that, had plaintiff known it, he would not have entered into the submission. Arbitrator examined parties (the arbitrator swore he formed his judgment independent of defendant's testimony). If defendant's testimony had been the ground of arbitrator's proceedings, it possibly might have been a ground for entertaining this motion. *Tindal, C. J. (Smith v. Sainsbury, 9 Bing. 31).*

(b) Where costs were to abide the event, and on award, the defendant made an affidavit that had the plaintiff claimed no more than was awarded, he would not have defended the action. Held, he should have tendered the amount which was due, he knew what sum he had paid. (Application was to review the taxation on these grounds, the Master allowed the plaintiffs the costs). "We have no power to grant this rule, the arbitrator decided the whole case upon the merits, and in so doing has determined the particular rights." (*Smith v. Eldridge, 4 Ad. & E. 66, Denman, C. J.*)

(c) At a meeting whereat the defendant closed his case, and a day was appointed to hear the plaintiff's reply, but no notice of such meeting was given, and the arbitrator made his award; held, the application to set aside the award must be made within the term next after the award is made. (*Hemsworth v. Bryan, 14 Law Jour. 36*).

(d) *Anderson v. Fuller, 7 D. P. C. 52.*

very particular cases, allow any extension of the time (a) ^{State of case for the opinion of the Court.} given by the statute to set aside the award, where a motion was made on the last day but one of the term for leave to

(a) Application by defendant to plaintiff's clerk to make affidavit of execution of submission, and waiting an answer, was cause of delay; and a term passed, held no sufficient reason for delay. (*Emet v. Ogden*, 7 Bing. 258).

The rule was enlarged, by consent last term, when defendants would have been in time for correcting any mistake they had fallen into, the rule was discharged for a technical objection. A fresh rule nisi was obtained, and it was objected the Court could not grant a rule after the end of the term subsequent to the making the award. The submission is by nisi prius, and a verdict taken subject to award, the case, therefore, is not within the statute of 9 & 10 Wm. 3. "I am of opinion that the time limited in the statute is not imperative on the Court, though I think a very strong case should be made out to justify a deviation from the usual course, and this is such a case. The rule was obtained in due time, and questions were raised on the face of the award by the arbitrator, in accordance with the terms of the submission, the objections to the rule were of a strictly technical nature, and if taken before the rule was enlarged, would have been cured. The danger of allowing a new motion where the party or his attorney has made a blunder at first was much pressed. I think it would be conclusive where the materials are originally defective in substance, but not where there is a mere slip in form." *Patteson, J.* (*Sherry v. Okes*, 3 D. P. C. 360, *et seq.*)

Perring v. Keymer, 3 D. P. C. 98. Motion was to set aside an award under the 9 & 10 Wm. 3, on the last day but one of the term, the difficulty was, the submission was not made a rule of Court; the successful party had obtained possession of it, and would not make it a rule of Court, in order that the first term after award might pass by; several attempts had been made to obtain the possession ineffectually. "You may make your motion next term, and if a rule nisi is granted, it will be dated as of this term." *Williams, J.* (99).

Ex parte Todd, W., W. & D. 577. Application why an attorney should not show cause why he should not make an affidavit of execution, that a deed of submission might be made a rule of Court; it was required that cause might be peremptorily shown, otherwise the rule to set aside would not be in time; the rule was granted for the attorney to show cause why he should not make the affidavit. *Littledale, J.*

move on the last day. Maule, J., refused, and said "it would, in effect be the repealing of the statute" (a).

Motion to set aside an award for matter extrinsic.

When the motion is to set aside the award for matter extrinsic, it should at least appear, that the applicant required the arbitrator to adjudicate upon the matter in dispute, as to point out the clause in the agreement which expressly required the arbitrator to adjudicate upon that particular part, and which the affidavit also should state (b).

Application to arbitrator to decide interests.

Acceptance or payment of costs.

In the case of *Kennard v. Harris* (c) the Court held that the acceptance of the costs precluded the party from moving to set aside the award, for the acceptance of the costs, was an admission of its validity. In *Bartle v. Musgrave* (d), which was an application for the Master to review his taxation, the costs having been paid, and it was found afterwards that the arbitrator had committed an excess of jurisdiction. Patteson, J., said, "he did not see how he could interfere, and that the application should have been to set aside the award *pro tanto*, and that the fact of having paid the money awarded, did not appear to him to make any difference, or prevent the motion being made." (The rule nisi was granted). (e)

If the principle, as laid down above, in *Kennard v. Harris*, is the correct one, and which appears to be so, it is difficult to understand how a distinction can be drawn between the acceptance and the payment of the costs, for in both cases the act is a voluntary one, on the

(a) *In re Evans v. Howell*, 4 M. & G. 769.

(b) *Pinkerton v. Carton and Another*, *contra*. Two actions were referred, one for work and labour, the other for damages, on a bond for not fulfilling a contract, whereon damages were found but not to the amount of the contract. (Abbott, C. J.)

(c) 1 B. & C. 801.

(d) 1 Dowl. N. S. 326.

(e) Cause does not appear to have been shown within the terms next after the award was made. (S. B.)

part of the acting person, and, therefore, the acceptance of costs can be no more an admission of the validity of an award, than can the payment, and in either case, there might have been partiality, or corruption unknown to the parties, and which, if the motion was made within the proper time, would be sufficient to vacate the award; so it could not be answered, that the payment of the costs, or compliance with the matter of the award, was enforced by compulsory means, for if there is a defect on the face of the award, it would be a sufficient answer to any proceeding to enforce the award, whether by an attachment, or by an action (a). The payment of the costs would seem to acknowledge, that though the award on the face appears defective, yet that the finding was in accordance with the intention of the parties, and by the payment of the costs, the objection was waived; but it is doubtful if the principle is open to a larger construction, for it might be, payment was made, or the acceptance, was by a person who had a knowledge of such extrinsic circumstances as would go to the destruction of the award, and if the rule, without qualification, was allowed to stand, it would be enabling a person to take advantage of his own fraud.

It is therefore submitted, that for all defects apparent upon the face of the award, an acceptance or payment of the costs, or thing awarded, authenticates the award, and would be conclusive against the parties, but it would not be where the matters were extrinsic. In that case the acceptance, or the payment would be in ignorance of the circumstances, and therefore, the party would not be bound thereby.

In all cases where a rule of Court is applied for, to show cause against an award, the short grounds on which it is

Acceptance or payment of costs considered.

Rule, payment of cost, effect of.

Statement of the grounds of objection in the rule nisi.

(a) *Kerr v. Jeston, supra.*

Statement of
the grounds of
objection in the
rule nisi.

Arbitrator
keeping back
order of refer-
ence.

applied for, must be stated therein (a), and, in the Court of Common Pleas, it must appear to be drawn up, upon reading the rule of Court (b), so a copy of the award should be appended thereto. The Court have no power, where the rule is defective, to amend it (c).

Where the misconduct of the arbitrator prevents the production of the original order of reference, the Court will allow a duplicate to be made a rule of Court (d); so a party

(a) *Smith v. Briscoe*, 11 Price, 57. In future where a rule to show cause is obtained in this Court to set aside an award, the several objections thereto intended to be insisted on at the time of making such rule absolute shall be stated in the rule to show cause. By the Court. (4 B. & Ald. 539.)

Staples v. Hay, 15 Law Journ. 60. A statement that the ground of motion (in a rule nisi) to set aside an award, was that the arbitrator had exceeded his authority is insufficient, unless the affidavit points out some specific defect, and Wightman, J., said, "he thought it was very convenient such rule should be observed, for nothing is so difficult sometimes as to ascertain a matter which may seem an excess."

(b) *Christie v. Hamlet*, 5 Bing. 195.

(c) The rule for setting aside the award was drawn up on reading the affidavit of the clerk of the barrister who made it, and no copy was annexed to the affidavit; it was not drawn up on reading the award nor was there any reference to it upon the face of the affidavit, and the award not being before the Court no objection to it could be considered. It was then contended, the Court would allow the rule to be amended: "We have no power to make this amendment,—there are two objections to this rule, first, the drawing up the rule on reading the affidavit of the clerk to which no copy of the award was attached, and not on reading a copy of the award; secondly, rule should have been drawn up on reading the record and the declaration, one objection being, it appears, on the declaration. Here (Queen's Bench) the rule for setting aside a verdict is drawn up without reading anything; in the Common Pleas, on reading record, as a verdict is taken subject to arbitration, I think I may look at the record as I could on a motion for setting aside a verdict. (*Sherry v. Oke and Others*, *supra*. *Patteson, J.*)

(d) *Thomas v. Philby*, 2 D. P. C. 145.

may, on affidavit, obtain a rule to show cause why the other party should not produce the order of reference (a). The rule for moving to set aside an award, applies not to the term where the submission was made a rule of Court, but to the term next after the award was made and published, and of which a letter, stating that it would be set aside, is sufficient evidence.

Party keeping back order of reference.
To set aside not under statute.

To take the case out of the ordinary rule, that applications to set aside awards, not under the statute, must be made within the time for moving for a new trial, should show clearly to the Court the reason why the application is made so late (b); under which rule fall those causes which are referred at Nisi Prius, unless matters in difference, are referred also.

When a rule has been obtained to set aside an award, the Court will presume the objections taken upon that rule, are all which can be taken to the award (c). The rule to set aside an award must state the grounds of the objection (d); and it is insufficient to state, as grounds of objection, that the award is not final, that the arbitrator has exceeded his authority, that the award was uncertain, that

Objections appearing upon the rule.
Grounds of objection, state of.

(a) *Boston (Lord) v. Mesham*, 8 D. P. C. 867.

(b) *Reynolds v. Askew*, 5 D. P. C. 682. "The cause was taken down to trial, and before trial referred by the agreement of the parties: the question, was, whether the application was under the statute or under the common law jurisdiction. It was said the first positive information which showed ground for setting aside the award, was obtained in February, and by a Judge's order proceedings were stayed until Easter Term. It is then the Court first has jurisdiction, the conditions of the statute has not been complied with, and the case is not a matter for the decision of the Court at Common Law, for it is not shown when the award came to hand, nor sufficiently that the applicant did not know the grounds on which he seeks to set aside the award until February, either way the application is too late." (Coleridge, J.)

(c) Lord Ellenborough, C. J., in *re Hillyer v. Snook*, 2 Chit. 266.

(d) *Supra*, p. 181.

Grounds of objection, statement of.

the arbitrator had not decided upon all matters referred to him (a). The object of the rule is, that parties may not wander about in search of the defects relied upon by their opponents (b).

Order of reference containing clause to make submission a rule of Court.

Where the submission is silent, as to making it a rule of Court, and the order of reference only says the award may be made a rule of Court, in such case the submission may be made a rule of Court (c).

To set aside order of reference.

If, on a reference, either, by the terms of the rule, is precluded from going into evidence of matters of which he is desirous of trying; his remedy is, to move to set aside the order of reference, (he cannot impeach the award) (d).

Statement of fact supposed to be supported by affidavit.

Where a rule was obtained, and a fact stated, which was supposed to be supported by affidavit, but was found not to be, and an application was made that an affidavit of the matter might be filed, the Court expressed a great disinclination to depart from the general rule, but granted it, on condition that the affidavit should be sworn and filed the same night (e).

Copies of affidavits, application for.

When affidavits are used to set aside an award, if requested to be filed at the time, the Court will direct them to be, and it must be so stated in the affidavits; an application that the defendant should be supplied with copies, is insufficient, and the Court will not interfere (f).

Rule nisi, what.

Where the rule, (which is a six days' rule,) was obtained on the last day but five of the term, on application that cause might be shown on the last day of term, instead of the next term, the Court held, if very special reasons were

(a) *Gray v. Leaf*, 8 D. P. C. 655, *vide Allenby v. Proudlock*, 4 D. P. C. 56.

(b) *Alderson, B., Dunn v. Warlters*, 9 M. & W. 293.

(c) *In re Story, James v. Robinson*, 7 Ad. & E. 602.

(d) 2 Ohit. 39, note, citing 3 Taunt. 378, 432.

(e) *Perrin v. Kymer*, 1 Har. & Wol. 20.

(f) *Pilmore v. Hood*, 8 D. P. C. 21.

urged on support of the application, it would be granted, not otherwise (a).

When an action is brought in one Court, and it is agreed the submission shall be made a rule of another Court, the rule will be made absolute in the first instance if it has already been made a rule of the Court wherein the action commenced (b). In *re Welsh and Others* (c), Patteson, J., held that where the object was to set aside an award any part of the agreement without the enlargement might be made a rule of Court, and his Lordship stated that the practice had been different, but that it was a bad practice, and the sooner it was discontinued, the better, but that if it was sought to enforce the award, the case might be different.

Leave to enter up judgment on a verdict reduced by an award, is absolute in the first instance (d), and when made a rule of Court the plaintiff is, without motion entitled to the *postea* (e). Where application was made to the Court to discharge a rule of Nisi Prius on the ground that a third person had consented to join in the reference, and refused, it was objected, the motion should have been for leave to enter a verdict, on hearing that rule, the Court would have enforced terms. Tindal, C. J., held the rule may be moulded to meet the justice of the case when the plaintiff applies for leave to try a cause, it is a more just application than that which he should have applied for (f).

Where a personal knowledge of an award and of a rule of Court was brought home to both the defendants, it was

Making cause a rule of another Court.

Leave to enter up judgment on a verdict reduced by an award.

Application to discharge rule of nisi prius.

Service of award and rule.

(a) *Arthur v. Marshall*, 8 Jurist, 1011.

(b) *Miller, Administrator of Crawfield*, 9 D. P. C. 124.

(c) 1 D. N. S. 331.

(d) *Higginson v. Nesbit*, 1 B. & P. 97.

(e) *Grimes v. Naish*, 1 B. & P. 480; *Borrowdale v. Hitchener*, 3 B. & P. 241, S. P.

(f) *Bacon v. Cresswell*, 1 Hodges, 187.

held sufficient, and to be equivalent to a personal service in the ordinary way (a).

Costs of motion
to set aside
award.

The costs of a rule to set aside an award, are costs in the cause, and a good reason for such rule is, that there is no verdict until the discussion on the award is over, so all proceedings until then are stipulations in the cause (b), and where, on the discussion of a rule upon technical grounds, which were held sufficient, if there is an objection also upon the merits, the party may argue thereon, if the opposite side refuse to allow costs (c).

(a) *In re Bower*, 1 B. & C. 264, *vide supra*.

(b) *Goodall v. Ray*, 4 D. P. C. 3, Coleridge, J.

(c) Coleridge, J. *In re Chamberlain*, 8 D. P. C. 687.

COSTS.

The power which an arbitrator has over the costs of the cause, as well as over the cause itself, emanates from the parties themselves, and it was said (*i. e.* of the reference), if no directions are given in the submission respecting the costs of an award, they are to be paid by both parties equally (*a*); but in a case where the arbitrator intimated verbally to the parties that each was to pay his own costs, to which they acceded: upon the cause being referred back to him, the arbitrator gave no direction (in this case the arbitrator had to certify for what amount the verdict was to be entered), on motion to compel the prothonotary to review his taxation, he having refused to allow the costs of the second reference, the Court made the rule absolute (*b*), the reason of the distinction between these cases is, that in the latter the arbitrator had merely to certify in which case the proceedings before the arbitrators are considered, as before the Court, and consequently the costs of the reference are costs in the cause (*c*). Costs.
No decisions in submission.
Costs when the arbitrator has to certify.
Reasons of distinction between award and certificate.

Where the submission is silent as to the costs of the cause, the arbitrator has power to award them (*d*), for it is an act consequent upon the authority conferred upon him for Submission not mentioning the costs, effect of.

(a) *Groves v. Cox*, 1 Taunt. 165, Mansfield, C. J.

(b) *Mackintosh v. Blyth*, 1 Bing. 269.

(c) Pollock, C. B., "A certificate is the mere expansion of a cause, and as no award is to be made, the costs are to be taxed in the same manner as in a cause, but in the case where the arbitrator is to make an award, the costs in the cause are those incurred up to the time of the reference." (*Brown v. Nelson*, 14 Law Jour. 63).

(d) *Supra*, p. 16.

Submission not mentioning the costs, effect of.

determining the cause, and the insertion of a direction as to the costs is a restriction of his power of allowing the costs at his own election (a), which principle was recognised in the case of *Whitehead and Others v. Firth* (b), wherein it was said, "yet the omission could not be considered as giving him a greater power to award costs as between attorney and client than he would have had if the power over the costs had been generally mentioned in the submission," in which case the costs would be between party and party. In the case of *Bradley v. Tunstow* (c), Eyre, C. J.,

Costs, general rule.

said, that as a reference to arbitration was entered into for the convenience of both parties the expenses ought to be borne by both, and as a provision for the costs of the reference is generally made in the rules of reference, the omission is a strong argument to show they are not here intended to abide the event of the arbitration, from which, and the cases above, it may be collected, that when the costs are not mentioned in the submission or order of reference, the arbitrator has power over the costs of the cause, but that the costs of the reference are to be borne by the parties mutually.

Arbitrator to award costs.

It was said that where the power of awarding costs is in the discretion of the arbitrator he may award a gross sum for costs (d), or that one party shall pay the other such costs as shall be allowed by the Master upon taxation (e), or he may award them generally, in which case the taxing officer of the Court will assess them (f); in some cases the arbitrator is bound, by the terms of the submission, to assess the

(a) *Roe v. Doe*, 2 T. R. 644.

(b) 12 East, 166.

(c) 1 B. & P. 35.

(d) *Shepherd v. Brand*, Ca. temp. Hard. 53.

(e) *Winter v. Garlick*, 1 Salk. 75.

(f) *Dudley v. Nettlefold*, 2 Stra. 737; *Fox v. Smith*, 2 Wils. 267.

costs (a). Though it is said the arbitrator may award a gross sum for costs, that is meant the costs of the cause. In *Turner v. Nore* (b), it was held that it was no grounds for setting aside an award, because the arbitrator had given more costs than, by calculation, they would amount to. In *Broadhurst v. Darlington* (c), where a bill of costs for managing an estate was referred to an arbitrator, with power to obtain the assistance of the Master to tax it, and the objection was, that too much was allowed for certain items, and that the matter should therefore be referred back to the arbitrator. Lord Lyndhurst, C. B., said "if the arbitrator intended to adopt the proper rule, and did not, the award was not his, but the only question was, whether the rule adopted by him was the correct one, which it was found to be," and the rule was discharged. This case, in some degree, would seem to impugn the doctrine laid down in *Turner v. Rose* (d), for the bias of his Lordship's mind seemed to be, that, on such a reference, the arbitrator was to be guided by the formulæ usually adopted by the Courts—but both *Turner v. Rose*, and *Broadhurst v. Darlington*, appear opposed to the case of *Shepherd v. Brand* (e), as also the case of *Robinson v. Henderson* (f), wherein the arbitrator awarded a gross sum for the costs of two actions of the reference, and for making the award, which the Court held was bad, as he should have specified a distinct sum in respect of each. It is presumed the discretion of the arbitrator is a discretion to be directed in accordance with the principles of law, for we have seen that where he makes an error so manifestly wrong as to amount almost to misconduct, the Court will grant relief (g); so also the Court

Arbitrator to
award costs.

Discretion of
the arbitrator
must be reason-
ably executed.

(a) *Infra*.

(c) 2 D. P. C. 38.

(e) *Ubi supra*.

(g) *Supra*.

(b) 1 Lord Kenyon, 393.

(d) *Supra*.

(f) 6 M. & S. 276.

Discretion of the arbitrator must be reasonably executed.

will vacate the award for any excess, as an award of costs, to be taxed as between attorney and client (*a*). It may be therefore said to be a rule that, where the costs are left in the discretion of the arbitrator, it means a reasonable discretion, or it might be, the matter of the award would be found for one person, and be greatly counterbalanced by an award of costs against him, for exceeding it in amount, or, which could at law have been recovered, even if a verdict had been found for the party.

Reference of a cause on the usual terms.

Where a cause is referred on the usual terms, it is always understood to mean that the costs of the cause shall abide the event of the award, of the reference in the discretion of the arbitrator. Where the provision is generally, that the costs shall abide the event of the award, the costs of the reference are included (*b*); but when the order of reference, or the submission is silent as to the costs, the arbitrator can give directions as to the costs of the action, but not of the reference (*c*), of that, each must pay his own costs (*d*). When the submission contains a general power, that the costs shall abide the event of the award, it means the costs of the cause, of the reference, and of the award (*e*), and the event is not the decision of any particular issue, but of the action generally (*f*). Where the arbitrator awards a certain something to be done by each for the advantage of the other (the costs abiding the event), in such case each would pay their own costs (*g*). In *Jones v. Powel* (*h*), Coleridge, J.,

Abide event, when.

Award mutually advantageous.

(*a*) *Infra*.

(*b*) *Supra*.

(*c*) *Taylor v. Gordon*, 2 Moore & S. 725; *Firth v. Robinson*, 1 Bar. & C. 277; *Rolls Abr. (K.)* 13; *Bell v. Bellson*, 2 Chit. Rep. 157.

(*d*) *Grove v. Cox*, 1 Taunt. 165.

(*e*) *Wood v. Kelly*, 9 East, 336; *Watson on Awards*, p. 124.

(*f*) *Harrison v. Duckworth*, *supra*; *Reeves and Another v. McGregor*, 9 Adol. & Ellis, 981, S. P.

(*g*) *Yates v. Knight*, 2 Bing. N. S. 277.

(*h*) 6 D. P. C. 483. Costs and Charges, &c. to abide the event

held, where there are several actions referred and the costs are to abide the event of the award that must mean the event as to each particular action, distributively, the object was not merely to take away the discretion of the arbitrator as to the costs, but to make them follow in the course of law, but which would be frustrated, if the consequence of a partial finding was, that no costs were to be paid at all; generally, when all costs are to abide the event, as well of action and other matters, reference, &c., the Courts are bound by the words of the submission, and have held, no costs are payable, unless every thing be decided one way. This case stands on its own ground.

Award
mutually ad-
vantageous.

The event of an award, means the legal event (a), and, therefore, in all cases where the costs are dependant upon the event, the arbitrator must make a legal determination of the action, or the award would be bad; when his decision contains a legal event, and the action is determined thereby, the award carries costs, in the same way as a judgment, or a verdict. Where a payment was made into the Court, and the arbitrator awarded the plaintiff had no claim beyond, it was held the defendant was entitled to the costs of the action, and of the reference (b), Parke, B., saying, "the money paid into Court, was as though it was struck out of the

Costs abiding
event.

Payment into
Court, effect.

of the award; by the award the plaintiff was directed to do some things, and the plaintiff others. Arbitrator directed the costs to be paid by the defendant, application was to set aside the award, &c. "As regards costs, we think the defendant is right, for as the award is drawn, he may have gained more by the award than the plaintiff, and the agreement of reference makes no provision for costs in the event of an award like the present." Denman, C. J. (*Boodle v. Davis*, 3 Ad. & E. 206). "Where all matters in difference are referred, it seems under such an order each party must pay his own costs, unless every thing is found in favour of one." Patteson, J., 208.

(b) *Vide supra*.

(c) *Davidson v. Garret*, 2 D. P. C. 624, *supra*.

Payment into
Court.

declaration, and, therefore, was no longer a matter in difference." Payment into Court is an admission, that, to that amount, the defendant is wrong, and is, therefore, liable to pay the costs up to the payment of the money into the Court (a).

Finding under
20l.

Where also a sum is awarded beyond the payment into Court, but which, together with the payment, does not amount to 20l., the costs are taxed upon the lower scale (b). Where an action by executors was referred at Nisi Prius, and the arbitrator decided against their claim, it was held the defendant was not entitled to the costs, for if a verdict had been found against the plaintiffs, being executors he would not, and that a reference places them in no worse position (c). Where trespass was brought for pulling down gates, for an assault, and to all the counts but one, justification was pleaded under different rights of way, and to the

Reference by
executors.

(a) Payment of 42l. into Court, all matters in difference were referred. Award directed payment of 1l. 3s. 10d. in addition, and each to bear their own expenses. "If I could perceive this was a reference of the cause, I should say the rule should be discharged, (which was to tax costs on taking money out of Court). By paying the money into Court the defendant admits he is so far, wrong, then up to that time the plaintiff is entitled to costs." (*Stratton v. Green*, 8 Bing. 430, *Tindal, C. J.*, *vide Taylor v. Lady Gordon*, 9 Bing. 570, which was a reference of the cause).

(b) *Wallen v. Smith*, 6 P. D. C. 103. Two pounds were paid into Court on a plea of set off, cause was referred, and it was agreed that he in whose, &c., should enter up judgment as if a verdict was obtained; the arbitrator found 1000l. above the money paid into the Court, and the Master taxed the costs upon the higher scale. On motion to review taxation, Lord Abinger, C. B., said, "I am inclined to think there is a recovery of less than 20l. within the terms of the directions to the taxing officer. It is a recovery by process and judgment; the word recovered applies generally to all cases in which a party does not recover more by his process than 20l."

(c) *Highman and Another, Executors v. Kassel*, cited 3 T. R. 139. This case was before the statute making executors liable for the costs of actions brought by them, 3 & 4 Wm. 4, c. 42, s. 31, *et vide supra*, p. 35.

whole not guilty, the arbitrator found a right of way, but a different one to that, set forth by the defendants, and awarded 5s. as damages for the assault, the Court held, the plaintiff could recover no more costs, than damages, the arbitrators' award not being tantamount to a Judge's certificate under 22 & 23 of Car. 2, c. 9 (a). Costs abiding event.

Where the plaintiff's demand was originally under 40s., and from the award of the arbitrator it appears it might have been recovered in a Court of conscience, it will not deprive him (plaintiff) of his costs, for the event of the award is in his favour (b), and to overset the principle provision should have been made in the submission. Still, though the principle is so far favourable, yet there is the construction of a statute antagonist thereto, and, as an award is in the nature of a judgment, it will of course follow those rules which relate thereto, therefore, if by the award the case is brought within any Court of Requests' Act, the plaintiff can be deprived of his costs, if the defendant applies promptly for a suggestion; in the case of *Hipperley v. Layng* (c), where the defendant allowed a term to elapse before he made application therefor, the Court held he was too late, and that, though the plaintiff had not signed Demanding under 40s.

(a) *Swinglehurst v. Altham and Another*, 3 T. R. 138, *et vide*, *Ward v. Mallinder*, where the finding was that the trespass was wilful, 5 East, 489.

(b) *Day v. Mearns*, 2 Chit. Rep. 156; *Watson v. Gibson*, Tidd. Prac. 875, sixth ed.; *Butler v. Grubb*, cited 3 T. R. 139; *et vide* *Holden v. Newman*, 13 East, 161.

(c) 4 Bar. & Cress. 863, *Watchhorn v. Cook*, 2 M. & S. 348, and *Calvert v. Everard*, 5 M. & S. 510, were cited, but Bayley, J., held that they did not establish that a defendant was always in time until final judgment; they merely decided that application after judgment was too late: so *Keene v. Deeble*, 3 B. & C. 491, which was a case occurring under 43 G. 3, c. 46, s. 3, wherein it was held reference to arbitration took the cause out of that statute, and it was argued by analogy it should apply to this case, in that case the point was not noticed, as the application was held to be made too late.

Replevin suit,
reference of.

final judgment. Where an action of replevin was referred before issue joined, in which the defendant avowed as landlord for rent in arrear, and the arbitrator made his award in favour of the defendant, it was held he was not entitled to double costs under 11 Geo. 2, c. 2, s. 22, for the plaintiff was neither nonsuited, had discontinued, or had judgment signed against him, if the arbitrator had awarded a discontinuance it might have made a difference (a).

Matter which
is for the benefit
of one of the
parties only.

Where an inquiry is to be made, or something is to be done, which is manifestly for the benefit of one of the parties, such costs, will be considered as the costs of the proceeding, and if the submission is silent as to the costs, the party to be benefitted will have to bear the costs (b).

(a) *Gurney v. Buller*, 1 Bar. & Ald. 671, as to a discontinuance, see *Leaming v. Fearnley*, 5 B. & Adol. 403.

(b) Reference is equivalent to a trial, and this case (nothing was said in rule for the new trial of the costs of the first) falls within the rule laid down in *Smith v. Haile*, (wherein plaintiff having failed in the first trial, through the imperfect statement of a special case, the costs of the first trial were refused). (*Summers v. Formsby*, 1 B. & C. 99).

Where in an action of trover the plaintiff recovered a verdict for the full amount of the damages, and consented to take back the goods converted in reduction of damages, subject to the inquiry of an arbitrator as to their deterioration, which amount, together with the costs of the cause, were to be paid the plaintiff: the order was silent as to the costs of the reference. Held, that the costs of the reference were substantially costs in the cause, the whole proceeding being for the benefit of the defendant. (*Attenborough v. Tregoning*, 7 Bing. 734).

An award to pay a sum of money, or to deliver certain wine. The defendant failed to deliver the wine, alleging sale, whereon the plaintiff consented to receive the proceeds. The attachment remained suspended, to enable the Master to ascertain for what amount the wine sold, to be discharged on payment or delivery; attachment was to be discharged on the payment of the costs. All costs fairly incidental to suing out an attachment must be considered as the costs thereof, and amongst them the costs of the inquiry, which is to enable

In a case where there were two trials, on the first of which the defendant obtained a verdict, in the second, the plaintiff, he is not entitled to the costs of the first trial (*a*), Lord Tenterden, C. J., held, "that where the arbitrator by his award directed the defendant to pay the costs of the cause, he must have been understood to have intended those costs of the cause, which the defendant would have been liable to pay, if the cause had been tried a second time, and a verdict had been found for the plaintiffs (*b*), but where the second trial is produced through the obstinacy of the defendant, the Court will decree the costs of the first trial against him (*c*). If a new trial is granted without any mention in the rule of the costs thereof, the costs of the first trial will not be allowed to the successful party, though he succeeds on the second (*d*). Where a verdict was found for a defendant on which the Court granted a rule for a new trial, which was referred, the costs being in the discretion of the arbitrator, who directed that the defendant should pay the costs of the cause, it was held the plaintiff was not entitled thereto, as an unsuccessful party can never have the costs of the first trial (*e*). In the case of *Thomas v. Hawkes and Another* (*f*), wherein, the position as above, was reversed, and the cause was referred, costs to abide the event, which was decided in favour of the defendant, Parke, B., held that as the defendant would not have been entitled to the costs, if the cause had gone down to trial, so he

the defendant to obtain his discharge, the inquiry being for his benefit. (*Tyler v. Campbell*, 5 Bing. N. C. 193).

(*a*) *Supra*.

(*b*) *Rigby and Others, Assignees v. O'Kelly and Others*, 7 B. & C. 59.

(*c*) *Payne v. Bailey*, 3 Brod. & Bing 304.

(*d*) Reg. Gen. Hil. Term, 2 Wm. 4, Rule 64, 3 B. & Adol. 383.

(*e*) *Rigby v. Okell*, 7 Bar. & C. 57.

(*f*) 9 M. & Wels. 53.

Costs of second trial. would not, in the case of a reference, his Lordship cited the case of *Jolliffe v. Mundy* (a), which he said was an authority in favour of the plaintiff, and though not precisely in point, yet it fell within the same principle.

Costs of reference and special jury. When the costs of the reference and the special jury are intended to be included, they must be provided for by special consent (b); and, where specially provided for, if the arbitrator certifies, the Court thought (in a case where the special jury had been obtained upon the motion of the defendant) the fair meaning was, that the arbitrator should have power to allow the costs of the special jury as costs in the cause, if he who moved for the same succeeded (c).

Cost of witnesses attendance under the general issue. In *Maggs v. Yorston* (d), Williams, J., held, that where the costs of the cause are to abide the event, and either party is to be at liberty to sign judgment for the amount payable thereunder, "it means there should be mutual remedies between the parties, in event of a decision in favour of either;" the award was in favour of the defendant, who signed judgment for the costs; held, he might do so, and in the same case his Lordship held that, under the general issue, the defendant was entitled to the costs of all his witnesses necessary to prove it, for he has a right to come armed at all points, and that the costs of his witnesses should not be limited, merely to the proof, that he was not the cause of the nuisance.

Award of, not to take out execution on the damages assessed. Where a matter in difference was a bill in equity, praying an injunction to a suit at law, and the arbitrator awarded, amongst other things, that no execution should be taken out by the plaintiffs, upon any verdict directed to stand for them, to enforce the damages so assessed, or the costs at

(a) 4 M. & W. 502, 7 D. P. C. 231.

(b) *Rex v. Moate*, 3 B. & Adol. 237, Lord Tenterden.

(c) *Finlayson v. McLeod*, 1 B. & Ald. 663.

(d) 6 D. P. C. 483.

law consequent thereon. On objection, Lord Denman, C. J., in delivering the judgment of the Court said, "it was not such an exercise of a discretion as to the costs, as the reference meant to exclude" (a).

Where the costs of a suit and reference, &c., were to abide the event of the award; and the arbitrator, in accordance with a power directed a nonsuit, and that the defendant should pay 25*l.*, Lord Denman, C. J., held that the plaintiff was entitled to the costs of the reference, and the defendant to those of the action (b). Costs of suit and reference to abide the event of the award.

Where there was an inquisition before the sheriff to set aside a verdict for excessive damages, which was referred, nothing being said about the costs, and the arbitrator reduced the damages 50*l.*, the costs of such reference are not costs in the cause, nor will the Court allow them as such (c). Writ of inquiry, reference of.

Where an arbitrator settles the costs on both sides, it is impossible to suppose that the intention is other than to put an end to the action. In this case (the submission was by bond)." I think the costs, as between attorney and client, could reasonably be given; where part of an award is adjudged bad, and the costs of the reference are given, it will depend upon circumstances whether they should stand, but when that part is bad, which materially affects the justice of the case, the award cannot be supported; if the award is held good, the costs will stand" (d). Settlement of the costs on both sides by the arbitrator.

Where the submission provides for affected delay, and the reference is thereby rendered nugatory, the Court will give effect to it, and compel the delayer to pay the costs (e). Affected delay. provision for.

(a) *Reeves and Another v. McGregor*, *supra*, p. 63.

(b) *Chittenham v. Walker*, 3 Ad. & El. 693.

(c) *Lewis v. Harris*, 2 B. & C. 620.

(d) *Hartnell v. Hill*, 1 Forrest, 75, Macdonald, C. J.

(e) *Bayley, B., Morgan v. Williams*, 2 D. P. C. 123.

- Motion to set aside an award when costs in the cause.** Where the plaintiff moves to set aside an award, and the defendant contends for a construction which cannot be supported, yet if the plaintiff is not successful, the costs of the motion will be costs in the cause (*a*). In cases where
- Extent in aid.** an extent issues in aid of the parties, and is referred, they are not liable to pay costs, even though the award is in favour of the defendant, for the Crown neither receives, nor takes costs (*b*).
- Costs of reference and suit in one allocatur.** Where the costs of a reference, and the suit were taxed in one bill, and included in one allocatur, (which was done by the consent of the defendant,) the Court held, that if an objection was made, it should have been made immediately, but when done with the assent of the opposite party, they would not disturb it (the allocatur) (*c*).
- Costs, when the arbitrator is to ascertain them.** Where the submission contains an express direction that the costs are to be in the discretion of the arbitrator, and that he was to ascertain them, such direction is imperative, and if he does not ascertain them, the Court will set aside the award, unless they are forgone (*d*).
- Damages found on two actions.** Where two actions were referred, and the arbitrator found damages in both, it was held, the costs followed of course (*e*).
- Arbitrator to tax costs.** Where the reference is to an arbitrator to tax the costs, the same rule as to the other duties of an arbitrator, applies here, and the parties are bound by his allowances (*f*).
- Costs incidental to an indictment.** Where an arbitrator directs, that if a defendant shall pay all costs incidental to an indictment, &c., the costs incurred

(*a*) *Hocken v. Greenfell*, 4 Bing. N. S. 103.

(*b*) Lord Lyndhurst, C. B., *Rex*, in aid of *Holles v. Bingham*, 1 D. P. C. 280.

(*c*) *Bignall v. Gale*, 3 M. & G. 862.

(*d*) *Morgan v. Smith*, 9 M. & W. 427.

(*e*) *Jupp and Others v. Grayson*, 3 D. P. C. 199.

(*f*) *Anon.* 1 Chit. 38.

include those which arose before the indictment was laid upon the table, as well as after (a).

Where an arbitrator has power over the costs, and does not award them, but said the defendant is to take up the award, and the plaintiff is to repay him a moiety thereof, but fixes no sum: in such a case, the prothonotary claimed jurisdiction, and said, where the sum was fixed, he had no power to alter it, but that where no sum was fixed, his office enabled him to assess what was reasonable. The Court refused the rule, and said, if the defendant should commence his action, or issue an attachment to enforce the repayment of the moiety, it would then be time for the Court to discuss whether an action, or an attachment would lie (b).

Where a person consents to a reference to the Master, to ascertain the amount of costs which are due, he cannot afterwards dispute the amount for which the Master gives his allocatur, though he taxes off more than a sixth, for if he wishes to dispute the claim hereafter, he should have stipulated for such a right (c).

In a case where the damages were found under 20*l*., and the arbitrator had no power to certify that the case was a proper one to be tried in a Superior Court, the Court held, under the circumstance, (which were peculiar,) the Master might use a liberal discretion in taxing the costs, and give them as between attorney and client: but, generally, unless the arbitrator has power to certify, the attorney can obtain costs from his client on the lower scale only, if the damages awarded be under 20*l*. (d).

The Court will compel the Master to tax the costs of an award made in the Vacation, before the expiration of

Moiety of costs direction to pay the other.

Prothonotary, power of.

Reference to Master by consent to ascertain amount of costs due, effect of.

Damages paid under 20*l*., without power to certify.

Costs, taxation of, before expiration of the time to set aside award.

(a) *Baker v. Townsend*, 7 Taunt. 422, Park, J.

(b) *Barrett v. Parry*, 4 Taunt. 658, *et seq.*

(c) *Watkins v. O'Gorman Mahon*, 5 D. P. C. 178.

(d) *Hallen v. Smith*, 7 D. P. C. 394.

Michaelmas Term, though the parties have the whole of the term to set it aside (*a*).

Power to certify certificate when invalid.

If there are three counts to a declaration, and on a summons counts one, and two, are objected to, but allowed, on the ground that the plaintiff will prove some special matter in respect of each, and the case is referred, with the same power for the arbitrator to certify, as a Judge has, his certificate should be confined to those counts which have been allowed by the Judge: "by introducing the third count, and not expressly mentioning the second, he confuses the matter, and renders his meaning doubtful, and under such circumstances the Master is right in not giving any effect to the certificate; but had the certificate have been rightly framed, the plaintiff having only succeeded on an issue to which the certificate related, he would have been deprived of all the costs of the cause" (*b*).

(*a*) *Little and Others v. Newton*, 1 M. & G. 976.

(*b*) *Dewar and Others v. Swabey and Another*, 11 Ad. & E. 913.

LIEN OF ATTORNEY.

An attorney being entitled to his costs, he has therefore ^{Attorney,} a general lien upon the proceeds of an action, and which ^{lien of} lien, no award can overset, for the parties, before reference, have no power, by an agreement between themselves, to defeat the solicitor's lien (*a*), so they do not increase the power they had by entering into a reference, and where the arbitrator, from a supposed power, directs, if there be two actions, that the costs of one shall be set off against the costs of the other (*b*), or against the gross sum awarded, the Court will set aside so much of the award as relates thereto (*c*); nor will the Court, upon the application of the

(*a*) *Ormerod v. Tate*, 1 East, 462. Award was to pay a sum in two instalments; the plaintiff's attorney hearing the parties were about to settle the matter between themselves to oust him of his costs, &c., he gave the defendant notice to pay the amount of the damages and costs to him and not settle the same with the plaintiff, for he had a lien upon them for his fees, &c.; notwithstanding which, on demand being made, he refused, and paid plaintiff, and told the attorney he would never pay him a shilling and he might get his costs as he could; whereon a rule was obtained by the attorney calling on the defendant to show cause why he should not, &c. The convenience, &c. requires that an attorney should have the same lien upon damages awarded as if he recovered upon a judgment, otherwise no attorney would be forward to advocate a reference. (Kenyon, 465.)

(*b*) An arbitrator cannot award the costs to be set-off, for if there were cross-actions, one judgment could be set-off against another, but the parties would be still liable for the costs. (*Highgate Archway Company v. Nash*, 2 B. & Ald. 598, Lord Tenterden, C. J.)

(*c*) *Cowell v. Betteley* and *Cowell v. Snow and Others*, 2 D. P. C. 780. Two causes and matters in difference were referred, to determine for what amount the verdict should be entered, the award was on the first 100*l.*, damages for the plaintiffs; in the second verdict for the defendants, the award then went to find the plaintiff was

Attorney.
lien of.

parties, allow a judgment in cross actions to be set off, unless the attorney's lien is first satisfied (a).

Money ad-
vanced by at-
torney to carry
on the refer-
ence.

Before the 1 & 2 Vict. c. 110, in a case wherein a bankrupt, who had not obtained his certificate, commenced an action for the balance of a claim, which was referred, and a certain sum was awarded in his favour, and was claimed by the assignee under the fiat; it was held, that the attorney had a right to have his lien for costs first satisfied; the attorney claimed 40*l.*, besides the costs, for money he had advanced, to further the subject-matter of the plaintiff's claim, but for that the Court held he had no lien.

Action for lien
in client's
name.

But in the case of *Holcroft v. Manby* (b), decided since the above statute, where the award was in favour of the plaintiff, who afterwards became a bankrupt, on the solicitor claiming, not only the costs of the reference, but the gross sum awarded, contending he had a lien thereon. Tindal, C. J., refused the rule, saying, a rule of Court has now the effect of a judgment, and therefore the matter should be free from all doubt, before such an order is made; if the attorney's claim is well founded, and such as the law entitles him to enforce, he may bring an action, in his client's name, upon the award, but if this rule is granted, the judgment is final, therefore the rule was refused.

indebted to Betteley in 86*l.* 11*s.* 6*d.*, and directed that sum and the defendant's costs in the second action should be set-off against the plaintiff's damages and costs in the first. A rule was afterwards obtained by the plaintiff's attorney to set aside so much of the award as related to the set-off of the damages and costs in the two actions as contrary to Reg. Gen. H. T., 2 W. 4, c. 93. "If there had been no reference, no agreement between the parties could have deprived the attorney of his lien for the costs, by referring the parties do not increase their powers to effect a set-off; execution may issue for costs for the first action notwithstanding award." (Tindal, C. J., 781).

(a) *Domet v. Hellyer*, *Hellyer v. Domet*, 3 D. P. C. 540, Patteson, J., *vide* *Symonds v. Miles*, 8 Taunt. 526; *Jones v. Turnbull*, 5 D. P. C. 591.

(b) 13 Law Journ. 208.

RELIEF ON ATTACHMENT FOR CONTEMPT.

By nonpayment of the costs, the party against whom they are awarded, commits a contempt of Court, and may be committed to prison therefor, but from which he can obtain relief by the various insolvent acts (a). The 1 & 2 Vict. c. 110, s. 79 (b), expressly provides for the liberation of persons in contempt, whether for non-payment of costs, or of money decreed: in such case for the costs or money awarded, he in whose favour the award is made, comes in with the other creditors.

Attachment for non-payment of costs, relief under insolvent acts.

(a) *Rex v. Carwen*, 8 Taunt. 60, *et seq.*; *King v. Myers*, 1 T. R. 266.

(b) Sect. 79. "That the discharge of any prisoner so adjudicated as aforesaid shall and may extend to all process issuing from any Court, for any contempt of any Court, ecclesiastical or civil, for nonpayment of money or of costs or expenses in any Court, ecclesiastical or civil; and that in such case the said discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence or by reason of such contempt, or on purging the same; and that every discharge so adjudicated as aforesaid, as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor before the filing of such prisoner's schedule, in any action or suit brought by such creditor against such prisoner for the recovery of the same; and that all persons as to whose demands for any such costs, money or expenses as aforesaid any such person shall be so adjudged to be discharged shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this act, subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such insolvent's estate and effects."

AMENDMENT.

Amendment of
the submission.

The terms of a submission may, with the consent of the parties, be amended, like any other agreement; (*e. g.*) an agreement of reference, which was under seal, was allowed to be amended by a subsequent agreement, not under seal, for it was held to incorporate itself into the prior bond (*a*): but these rules do not apply to cases where the reference is by a recognizance, for the rule of Court is not of record (*b*).

Amendment
of order of
reference.

The power to alter, is by consent of the parties; but where the rule is defective, and prevents the real intention of the parties from being carried into effect, the Court will interfere, it therefore follows, they cannot add any thing which requires the consent of the parties. In the case of *Evans v. Lewis* (*c*), wherein the parties agreed by order of Nisi Prius, that the defendant should sell certain property to the plaintiff, at a valuation, but which contained no condition that the defendant should make a good title; the Court held the material implication was, that where a person was to pay money for a thing, it involves in the terms, that the vendor shall convey to him, that, for which he is to pay, and in so decreeing, Gibbs, J., said, "we do not think we make a very wide

Sale of land,
implication.

Application to
equity, pre-
vention of.

stretch of authority in saying so." In the case of *Grimstone v. Bell* (*d*), the same Court ordered so much of an order of reference to be set aside, as prevented the parties from filing a bill in Equity for a discovery, without which, the

(*a*) *Evans v. Thompson*, 5 East, 189; in *re Tunno v. Bird*, *supra*.

(*b*) *Rex v. Bingham*, 2 Younge & Jer. 101.

(*c*) 6 T. R. 661.

(*d*) 4 Taunt. 254.

real justice of the case, could not be administered. But the Court of King's Bench refused to amend a reference, in accordance with terms contained in a paper signed by the counsel at the trial, it appearing that the understanding of the parties throughout, was in consonance with the terms of the order as drawn up (a). In a case where the associate had drawn up the order of reference generally, the Court, upon affidavit that the parties only intended to refer the matters in dispute in the action, set aside the order, to let in another trial, but refused to amend (b). In *Cross v. Metcalf*, executor (c), pending the reference, the arbitrator certified that it would be agreeable to the justice of the case to amend the replication on the last plea, by substituting for the present replication, the general replication *de injuriâ*, or any other replication, which put in issue all the allegations in the plea, on payment of the order and costs of such application. Lord Denman, C. J., said, "It would be going too far." Patteson, J., "The verdict has been taken upon a particular issue, by consent. Can we alter the terms, on which the verdict was taken, without consent?"

Application to equity, prevention of.

A substitution of one plea for another.

In the case of *Blunt v. Cooke* (d) the Court of Common Pleas allowed the plaintiff to amend his particulars of demand upon payment of costs, after the cause had been referred at *Nisi Prius*, on the ground, that a bill of particulars is a creature of the Court, and not regularly a part of the record (e). Where there was an application to set aside

Amendment of particulars of demand.

(a) *Pearman v. Carter*, 2 Chit. Rep. 29.

(b) *Rawtree v. King*, 5 Moore, 167; *Doe v. The Burgesses of Morpeth*, 3 Taunt. 378.

(c) 5 Ad. & E. 800.

(d) 4 M. & G. 458.

(e) *Blunt v. Cooke*, 4 M. & G. 458. This was an action for work and labour, the particulars of demand were delivered under a Judge's order; the defendant pleaded payment and a set-off, and the cause came on for trial, when a verdict was taken for the plaintiff

Amendment of
particulars of
demand.

an award wherein the rule nisi had been obtained in proper time, the Court would not allow it to be amended by reading an additional affidavit, made upon the last day of the term next after that in which the award was made (a).

Alteration of
an award.

When an arbitrator has exercised his jurisdiction, and made his award, he cannot alter it, even for the purpose of correcting a miscalculation of the figures, though it included the essential merits of the case, on the ground that an arbitrator having once completely exercised his authority, pursuant to the terms of the submission, is *functus officio* (b), any alteration made afterwards is a mere nullity (c).

Award lost.

Where an award was lost, the Court, on motion, allowed judgment to be entered up on it, no cause being shown to the contrary (d).

subject to a reference, of matters in difference in the cause; the rule was to amend the particulars by adding certain other items, on the affidavit of plaintiff's solicitor, who stated that the plaintiff having been in difficulty could not freely communicate with him and that the deponent had framed parts thereof partly from documents and partly from what the plaintiff had said, and now being furnished with other documents he found the plaintiff was entitled to more than the amount which was inserted in the particulars of demand, and he believed the greater part, if not all the additions, were inserted in the minute book of the company, and therefore defendant could not be taken by surprise. *Contrà*, an affidavit of several meetings before the arbitrator, and until the last, no suggestions were made as to these additions to the particulars, nor were they thought of, and deponent believed it to be an after-thought of the plaintiff's solicitor, fearing he might not prove all the items of the original parts. It was also contended when a cause was referred, it was referred as it stood. (Plaintiff fears if the particulars be not amended he may lose his claim at nisi prius—he might have withdrawn his record before the jury were sworn and amended his particulars. Tindal, C. J., 459.) Held, the rule might be made absolute to amend on payment of the costs (461).

(a) *In re Holloway v. Monk*, 8 D. P. C. 138.

(b) *Irvine v. Elton*, 8 East, 54.

(c) *Henfrie v. Bromley*, 6 East, 312, *vide supra*.

(d) *Hill v. Townsend*, 3 Taunt. 461.

MISCELLANEOUS MATTERS.

An arbitrator, though he is constituted a Judge between the parties, is so only for the purpose of decreeing what shall be done concerning the particular matters in dispute, and when he decrees any matter which is in the possession of one of the parties to be transferred to the other, such decree does not pass the specific property in the thing itself (a). Therefore, in order to give effect to the decision or the award of the arbitrator, the law has provided certain remedies to enforce it, viz., by an action on the award, attachment, for contempt of the rule of Court, and by proceedings under the 16th and 17th sections of the 2 & 3 Vict. c. 110. In *Wood v. Griffiths* (b), Lord Eldon said that

(a) *Thorpe v. Eyre*, 1 Ad. & E. 939; *Hunter v. Rice*, 15 East, 100. Trover, the question was, whether by the force of an award the property in a rick of hay was transferred without the assent of A. On a dispute between a landlord and tenant which was referred, the award directed the premises to be given up to the landlord, and that the hay, &c. &c. should be the property of the landlord upon his paying therefore certain sums named; on balancing the different payments to be made by each the tenant was to receive 18*l.*, which he refused, and also to deliver up the premises or execute the award and was evicted by ejectment and was in custody on attachment for the non-performance of the award. Afterwards having employed the defendant to take away the hay from the premises, which had been sold to another by B.'s wife, this action was brought, long after the day named in the award for the payment. A tender was first made of the balance said to be due; it was objected that trover would not lie; the plaintiff took the verdict with liberty for the defendant to move (101). "There is a difference between property awarded to be transferred by the owner to another and property which is actually transferred by the consent of the owner through his agent; in this case the only remedy is upon the award; if the money tendered had been accepted, it would have been a ratification of the award and an assent to transfer the property, without that, I cannot conceive the property was transferred by the mere force of the award." (Lord Ellenborough, C. J., 102.)

(b) 1 Swanst. 54.

Specific
performance.

it was clear a bill would lie for a specific performance of an award, because the award supposes an agreement between the parties, and contains no more than the terms of the agreement, ascertained by a third person, but this applies to cases where something is awarded to be done in specie, as the conveyance of lands, &c. (a), but the Court of Chancery will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor will it substitute the Master for the arbitrators, for that would be binding the parties contrary to their agreement (b). In *Emery v. Wase* (c), wherein the defendant agreed to sell an estate at whatever price B. should say it was worth, it was objected a much larger sum had been offered than B. had decreed, and that he had not exercised his own judgment in valuing the timber; the Vice-Chancellor said this was a bill against a man and his six daughters, some of whom were married women, and had not executed the agreement, and that he was not bound to decree a specific performance, more so, as the plaintiff had his remedy against the defendant, and those competent to make the agreement and to recover damages, and, if he prevails, he will be entitled as part of the damages, to the costs incurred by the arbitrator's survey.

Costs incurred
by agreement
to refer.

Interest on
money
awarded.
Remedy for.

Interest is recovered upon a sum of money awarded, from the day appointed for the payment of it (d). The remedy is by action, and not by attachment (e), but the interest cannot be included in the judgment entered in pursuance of the verdict, as it is supposed to be calculated upon the sum awarded (f), but where the arbitrator awards a certain sum

(a) *Hall v. Hardy*, 3 P. Wms. 190.

(b) *Agan v. Maclean*, 2 Sim. & Stu. 418.

(c) 5 Vesey, 846.

(d) *Pinhorn and Others v. Trickington*, 3 Camp. 468; *Johnson v. Durant*, 4 Car. & P. 327.

(e) *Churcher v. Stringer*, 1 D. P. C. 332.

(f) *Lee v. Lingard*, 1 East, 403.

and interest from the last settlement, which is a matter not in dispute, the award would be good; and it is presumed as the award is in the place of the verdict (*a*), it would be received as the verdict of the jury, and in such case the interest might be included, and the execution issue for the whole (*b*). Where there is a special contract for interest, or it is in accordance with the usages of trade; in equity compound interest will be allowed (*c*). Where an award stated a certain sum was due, which included interest after the rate of five per cent., calculated to three days after the date of the submission, it was held, the three days' excess was an immaterial point, and insufficient to set aside the award, for the Court could calculate the excess; but if the award was bad for such excess, it would be bad in toto; for the award of interest is so mixed with the award that it could not be severed (*d*). Where a person keeps his money unemployed in expectation of the completion of a contract, to purchase, the matter of which is referred; the loss occasioned thereby may be given as special damages—so also for the loss of interest on money other persons are keeping for him at his request, if *bond fide*, and under reasonable circumstances.

Award of a certain sum and interest.

Compound interest, when allowed.

Excess of, when ascertainable.

Keeping money unemployed.

A person interested in the subject matter of an award may assign his right, as in any other case, and the Court will not compel the assignee to find security for costs (*e*). And the Courts will recognise such agreement (*f*).

Assignment of subject-matter of award.

(*a*) *Lee v. Lingard*, *ubi supra*.

(*b*) *Plummer, Administratrix, v. Lee*, 5 D. P. C. 755.

(*c*) *Morgan v. Mather*, 2 Ves. Jun. 15.

(*d*) *Watkins v. Philpots*, 1 McClel. & Y. 393.

(*e*) *Day v. Smith*, 1 D. P. C. 461.

(*f*) *Smith v. Jones*, 1 D. N. S. 527. A. purchased of B. his interest in an award, the assignment was executed, and carried into effect, the plaintiff A. was appointed attorney to B. to receive and sue for the sums; on the award being made, A. took it up, and requested B. to

Court of Common Pleas at Lancaster, references by.

By the 4 & 5 Wm. 4, c. 62, s. 26, parties who have causes depending in the Court of Common Pleas, at Lancaster, may move for a new trial in the Courts of Westminster, and where since the passing of the act, a cause at such trial was referred, and a verdict was taken subject to an award, by which the verdict was directed to stand, the Court held that a motion to set aside the award, was not a motion within the meaning of the statute (the arbitrator had stated facts for the opinion of the Court). The Court held the motion must be made before a Judge at Chambers, and not in Banco (*a*). So where a motion under the same statute was made for a judgment *non obstante veredicto*, a verdict having been entered for the plaintiff in the Court of Common Pleas at Lancaster, the Court held they had no such power, nor could they direct how it should be entered (*b*).

Waiver.

As the agreement to refer springs from the will of the parties, it necessarily follows, that they may by express consent, and also by implied consent, waive any irregularities which should occur in the course of the proceedings. The waiver being a matter which may be said to overrule the expressed opinion of the parties, as declared by the submission, the proof should be very clear, and unless it is so, it will be rejected (*c*).

Court, power of.

The Court never interferes with an award, unless the parties submitting enter into the usual engagement to make it a rule of Court (*d*). The Court of Queen's Bench will enforce receive the money awarded and half the costs of the other party, who paid them to him in a check, which he received, and appropriated to his own use; this action was for the amount, and the Court held A. had a right to recover, and that the case falls within the principle, where money is due, *ex æquo et bono*, it may be recovered in an action for money had and received.

(*a*) *Byrne v. Fitzhugh*, 5 Tyrh. 221.

(*b*) *Potter v. Moss*, 3 D. P. C. 432.

(*c*) *Atkinson v. Jones*, 1 D. & L. 225, *et supra*.

(*d*) *Clarke v. Baker*, 1 H. & Wol. 215, *Williams, J.*

the decree of a colonial Court. Lord Tenterden, C. J., in *Henly v. Soper, Sen. (a)*, said, "The difference between the decree of a Colonial Court and the Court of Equity is, the first cannot enforce its decrees, the latter may, therefore, in the latter case there is no occasion for the interference of the Courts of law; we find the balance of a partnership account duly ascertained, and a decree for payment; a promise to pay it ought to be presumed: held verdict good."

Decree of a
Colonial Court,
and a Court of
Equity.

Witnesses, and the parties to the submission attending upon the arbitrator, are privileged from arrest *eundo, morando et redeundo*, no inexcusable time having elapsed from the conclusion of the matter (b). To a party to the submission want of means is no sufficient cause of delay, but ill health is (c).

Privilege from
arrest.

(a) 8 B. & C. 21.

(b) *Spencer v. Smart, Bart.*, Lord Ellenborough, C. J.; *Handal v. Gurney*, 1 Chit. R. 679; *ex parte Temple*, 2 Ves. & Beam. 395; *Moore and Booth*, 3 Ves. 350, S. P.

(c) *Spencer v. Newton, Lane v. Newton*, 6 Ad. & El. 623. Why defendant should not be discharged from the custody of the marshal; a cause was referred, and now defendant living in Yorkshire received notice to attend the arbitrator, and endeavoured without success to obtain a postponement, and he arrived, and when he reached London was without money, he attended the arbitrator as plaintiff and as a material witness (according to affidavit). Reiter, the defendant in arbitrator's suit complained that the order of reference was surreptitiously obtained and should move for execution to have order set aside. Arbitrator after taking some evidence *ex parte*, appointed February 15th; now defendant believed it was meet he should remain in London to answer Reiter's application, and besides he could not return for want of means, finding no rule had been served, he prepared to leave town on the 16th; on his way from his solicitors, he was arrested on two suits, he claimed privilege but was detained in custody. The Court on question of this must look to the reasonableness of the time—the question depends on the notice of a motion to be made in the Court of Exchequer; a party is not privileged in staying during the adjudication of an arbitrator; the Court cannot notice want of means, that is his misfortune; I am inclined to allow the full extent of privilege, but this would be going far beyond any

Arbitrator in
debt to a party.

The mere fact of an arbitrator being in debt to one of the parties, though unknown to the other, is no sufficient reason to set aside an award, though it is a circumstance of suspicion (a).

Attending by
counsel.

When a party purposes attending before the arbitrator by counsel, notice of such intention should be given to the arbitrator, because otherwise it would be taking an undue advantage (b).

Reference to
Master, mean-
ing of.

In a very early case where the return by the sheriff of a rescue was contradicted by eight affidavits, and the Court referred the matter to the Master, Ryder, C. J., said, "Where there was a doubt as to the rescue, and the Court refuses to inflict a small fine, but to refer the case to the Master, it intends thereby, not that the Master is to determine rescue or no rescue, but that the defendant shall speak with the prosecutor" (c).

Limitations of
actions upon
awards.

An award is not within the statute of limitations of the 21 Jac. 1, because it is not founded upon any lending or

of the decided cases." (Patteson, J., 629). "If it had been shown that the defendant's stay in London was entirely owing to his illness, I should have thought there was ground for the exemption claimed." (Coleridge, J.)

(a) *Morgan v. Morgan*, 1 D. P. C. 611.

(b) *Whatley v. Morland*, 2 D. P. C. 249. Action on a bill of exchange referred by nisi prius, arbitrator made award in favour of plaintiff; to set it aside; plaintiff attended by counsel before the arbitrator, without having given defendant notice. (Rule should state the ground of motion, but you can amend, Bayley, B.) On affidavit, it appeared, there was some error but no notice, and on attendance before the arbitrator, plaintiff being represented by counsel, the defendant requested an adjournment, but plaintiff insisted on having costs of the day. "Distinct notice should be given, I think one should not be attended by counsel and the other not, unless notice was given; the plaintiff had no right to the costs of the day." (Bayley, B., 250).

(c) *Rex v. Griffiths*, 1 Ld. Kenyon, 139.

contract, but arises from a breach of duty (a). So until the passing of the 3 & 4 Wm. 4, c. 42, the action on an award might be brought at any time; but by the third section of the act, it is enacted, that all actions of debt upon an award, where the submission is not by specialty, shall be sued or brought at any time within three years after the end of this present Sessions of Parliament, or within six years after the causes of such actions or suits, but not after (b). By this statute actions on awards have been limited since August, 1836.

Limitation of
actions upon
awards.

From the wording of the section in question, two difficulties present themselves, first, "as to the meaning of six years, after the causes of such actions and suits;" and secondly, as to the extent of the limitation when the submission is by specialty.

(a) *Hodgden v. Harridge*, 2 Saund. 64; *Gibbons on Limitations*, p. 66.

(b) Sec. 3. And be it further enacted, "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present Session of Parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

Limitation of
actions upon
awards.

It is submitted, the words "causes of such actions and suits" applies not to the subject matter of the award, but to the award itself, and such a construction is contended for, not only by analogy with the decisions under Lord Tenterden's act, (which in general terms agree that the statute runs from the time of the last written acknowledgment), but also, by possibility, it might be the award was not made until after six years after the cause of action accruing, or from the time of the last acknowledgment that there was a something due, which something, by the terms of the submission, is left to the decision of another person, and as the submission is the mutual act of the parties, and they thereby agree to abide by the determination of the arbitrator, such determination or award, is an ascertainment of the matter, and would be construed as an acknowledgment of the parties, and thereby a fresh cause of action is confessed, therefore the construction of the act must be, not that the statute should run from the time of the accruing of the original cause of action, but from the time when the award is made.

The difficulty which arises where the submission is by specialty, is, that the award is a something not ascertained by, and is extrinsic of the deed. The words of the section are "*that all actions of covenant or debt upon any bond or specialty shall be brought within ten years after the then Session of Parliament, or within twenty years after the cause of action accruing.*" If the submission to arbitration is by a deed conditioned in a penalty in event of the non-performance of the award, it is clear any action of covenant for the breach of the covenant must be brought within twenty years after the penalty accrued; for it is a thing ascertained by, and is of the subject matter of the deed; but whether an award can be said to be so, is a very different matter. By the prior part of the clause, it will be found there is a special exception to awards when they are consequent on a submission by specialty, but by such exception it is presumed the Legislature did not

intend such actions should be left as they were before the enactment, viz., to be brought at any time after the award made; then if such a construction cannot be admitted, it is equally clear that the general construction of the statute cannot be held to apply, for they are specially excepted. It is submitted, therefore, that the intendment of the Legislature was, that such award should partake of the specialty thus far, that when the award is made, if it is deemed advisable that an action should be brought upon the award, such action must be commenced within six years next after the award, but if it be deemed desirable that the action should be brought upon the deed, then it should be brought within twenty years from the execution thereof; it might be from the complication of the accounts, or matters submitted, or other causes, that the time was so delayed, that the award was not made within twenty years next after the submission, if then the action was confined to the covenant, the remedy of the party on the award would be defeated; but by allowing the action to be brought within six years after the award made, justice would be administered between the parties. It cannot be contended that the action on the award would be brought at any time within twenty years, for the reason above stated, viz., that the award, when made, is a matter beside the deed. There is no doubt the Court would view with great suspicion any action for the recovery of the matter of an award brought beyond the time of the common limitation (six years), though the action was one brought upon the covenant, unless a most satisfactory reason was given for the delay—as in a case where the application was for an attachment where the delay in prosecuting the remedy for the non-performance of the award, had extended to a period of four years, the Court refused the application (a).

Limitation of
actions upon
awards.

(a) *Infra, Attachment.*

EVIDENCE.

Award ad-
duces evidence
between third
persons.

An award is but the opinion of an arbitrator, not upon his own knowledge, but upon evidence laid before him, most probably in private, and formed *post litam motam*, and is not evidence against another (a), and therefore cannot affect the interests or claims of third persons. As where an ejectment was brought upon the several demises of a mortgagor and mortgagee, evidence was offered on the part of the defendant, that some years before he brought an ejectment, upon the same demise, against the mortgagor, for the premises now in question, who had been allowed to remain in possession, that the cause was referred, and an award made in favour of the defendant, who obtained possession; held, that the award was inadmissible as evidence against the mortgagee, with respect to whom the award was *res inter alios acta*, and on the question being reserved, the Court approved thereof, and Lord Denman, C. J., said, "Though at the time of the arbitration he knew that such an inquiry was going on, and on one occasion was present, but he was not bound to interfere." (b)

Evidence of an
award and what
produceable
under.

In *Evans v. Reece*, it was said, *arguendo*, that an award was admissible as evidence, upon the same principle as a verdict, and as an arbitrator is in the place of a jury, the verdict ought to be of the same weight as if found by

(a) *Evans v. Reece*, 10 Ad. & E. 156, Lord Denman, C. J.; *Rogers v. Wood*, 2 B. & Ald. 245; *Rex v. Cotton*, 3 Camp. 444; *Brett v. Beales*, 1 Mood. & M. 418, S. P.

(b) *Doe dem. Smith and Payne v. Webber*, 1 Ad. & E. 121.

them (a). To which Patteson, J., said, " Though the doctrine is perhaps established, as to the admissibility of verdicts, it does not appear to be founded upon any satisfactory principle. As between the parties themselves, the award is a conclusive proof, and may act by way of estoppel (b). As where a covenantor and a covenantee submitted the amount of damages, on a breach of covenant to arbitration, the award was held a conclusive admission of the amount of damages (c). So where in an ejectment the lessor of the plaintiff and defendant had submitted their title to the land to an arbitrator, his award was held conclusive (d). An award of money is evidence under an account stated (e). So where parties agree to be bound by an award, which is pending between other parties, the award is evidence against them (f).

Evidence of an award and produceable under.

Account stated.

Where the validity of an award comes into question directly or indirectly, the submission of all the parties should be regularly proved (g). It is competent to shew that an arbitrator has proceeded without jurisdiction. If the submission was to two persons named in a reference, and to a third to be appointed by them, such appointment must be proved, the mere recital is insufficient (h). Where the submission to arbitration is by deed, the deed must be produced (i). Where the authority of the arbitrator is revocable, the

Validity of an award.

(a) Citing *Lea and Lingard, supra*; *Bonner v. Charlton*, 5 East, 139.

(b) *Supra*.

(c) *Whitehead v. Tattersall*, 1 Ad. & El. 491.

(d) *Doe v. Rosser*, 3 East, 15.

(e) *Keen v. Balshore*, 1 Esp. 194.

(f) *Kingston v. Phelps, Peake*, 228; *Rogers v. Wood*, 2 B. & Ad. 245; *Rex v. Washbrook*, 4 B. & C. 132.

(g) *Antram v. Chase*, 15 East, Farr and Owen, 7 B. & C. 427.

(h) *Sale v. Halford*, 4 Camp. 19.

(i) *Farr v. Owen*, 7 B. & C. 427.

- Under Judge's order. defendant may show its revocation (a). Where a reference is under a Judge's order it is sufficient to put in an office copy of the rule of Court, but a recital in an award cannot be taken as evidence of the appointment of the arbitrator, proof must be given of some act by which the appointment was made, and which must have been a formal act, merely suffering a third person to sit with them, and sign the award, would be insufficient to vest him with any authority (b). The execution of the award itself must also be proved by means of the attesting witness, if it has been subscribed by one, or proof of his handwriting if the witness be dead, and perhaps that of the arbitrator, but where the time of the publication is not fixed by the evidence, but the making and publishing is sworn to, the Court will presume it was made in due time (c).
- Appointment of the arbitrator, proof of.
- Execution of award, how proved.
- Action on award. In case of action the notice of an award need not be proved, for the parties are bound to notice the award (d), for it is a general rule that where a matter does not lie more properly in the knowledge of one of the parties, than of the other, notice is not requisite (e), but if it be provided that the award shall be notified to the parties, it is no award until the notice is given (f). In the case of the *Attorney General v. Davison* (g), which was an action relating to the public stores, and which matter was referred to the auditors of the public accounts, it was held, that in receiving evidence they must be governed by the rules of law relating thereto.

(a) *Potts v. Ward*, 1 Marsh. 366; *Cooper v. Johnstone*, 2 B. & A. 394; *Edmunds v. Cox*, 2 Chit. C. T. M. 432.

(b) *Lord Ellenborough, C. J., Hill v. Halford*, 4 Camp. 17.

(c) *Doe and the dem. of Clarke and Another v. Sulwell and Another*, *supra*.

(d) *Hodgson v. Harrison*, 2 Saund. 62.

(e) *Gable v. Moss*, 1 Buls. 44.

(f) *Child v. Haden*, 2 Buls. 144.

(g) 1 McClel. & Y. 160.

It is said, that on an action being brought by the parties to an award, and it is averred that the subject-matter of the action is the same as that which the arbitrator adjudicated on, the arbitrator may be called to prove the matter was not laid before him (a), this decision would by reference to the case of *Dunn v. Murray* and *Smith v. Johnson*, appear to be very doubtful, unless it could be proved the arbitrator had no knowledge from the parties that such was matter in difference, or could gain it from the submission, for it is a rule when all matters in difference are referred (as was the case here), it applies to all matters of dispute which were in existence at the time of the agreement to refer, and in both the above cases, which were actions for matters which should have been properly included, the Court held the intention of the reference was the final close of all matters then in difference, but which rule could not be carried out, if the parties were allowed to omit some matters which were properly in difference, and afterward recover them by action (b). When an arbitrator is privileged from communicating matters which occurred before him, such privilege is not allowed on the ground of confidence, but arises from his position (c). In *Habershaw v. Trosby* (d), Erskine, J., proposed to examine the arbitrator as to a fact which took place before him, which Lord Kenyon would not allow, and said, "the arbitrator ought not to be permitted to depose here, what transpired upon the examination of the parties, or their books, on the principle, that neither of the parties could not have been examined at *Nisi Prius*, nor could the production of the books be compelled by a Judge at *Nisi Prius*, for the arbi-

Action on
award.

Arbitrator pri-
vileged from
examination.

(a) *Ravee v. Tanner*, 4 T. R. 146.

(b) *Supra*.

(c) *Ellis v. Sollam*, 4 C. & P. 327; *Johnson v. Durant*, 4 C. & P.

(d) 3 Esp. 38.

Arbitrator privileged from examination.

Admissions made before an arbitrator.

trator might have proceeded to cut the knot rather than to enravel it according to the strict rules of law."

Where admissions are made before an arbitrator, they cannot be considered to be made without prejudice (*a*), for they come as adverse before him, as before any other tribunal: the essence of an offer of composition is, that the party making the offer is willing to submit to a sacrifice. Lord Kenyon, in *Slack v. Buchanan* (*b*), said, "he should receive all such admissions which were made before an arbitrator, which a party would be compelled to make by a bill of discovery;" and in *Gregory v. Howard* (*c*), his Lordship said, "arbitrators may be admitted to speak to such matters of fact as were admitted by the parties before them."

General rule.

The distinction appears to be when mere facts are produced, and which could have been elicited in accordance with the rules of law, of such matters the arbitrator is examinable, but when the production is not in accordance with those rules, but arises from the arbitrator's equitable jurisdiction, of such things, he is not examinable.

Between strangers, an award is not evidence, even in a matter in which hearsay evidence is admissible (*d*).

Where an account is submitted to an arbitrator, and the submission is not by bond, his award may be given in evidence under a count on the account stated (*e*). So where in-coming tenants agree to take fixtures at a valuation, when such valuation is made, and the tenant enters, the value of the

(*a*) *Thompson v. Austen*, 2 D. & R.; *Westlake v. Collard*, B. N. P. 236; *Harman v. Van Hutton*, 2 Vern. 717; *Walridge v. Ken-neson*, 1 Esp. 123; *Doe v. Evans*, 3 C. & P. 220.

(*b*) *Peake*, 5.

(*c*) 3 Esp. 113.

(*d*) *Evans v. Reece*, 10 Ad. & E. 151.

(*e*) *Keen v. Balshaw*, *supra*.

fixtures may be given in evidence under an account Arbitrator privileged from examination. stated (a). Where a question of tenancy and rent were submitted, in an amicable suit, the Master of the Rolls held the tenant could not dispute the plaintiff's title to the rent, after acquiescence in the decision of the Master against him (b).

(a) *Salmon v. Watson*, 4 B. Moore, 173.

(b) *Allason v. Stark*, 9 Ad. & E. 255.

COURT OF CHANCERY.

Jurisdiction of
equity under
9 & 10 W. 3.

Practice of the
Court of
Equity.

The 9 & 10 of William 3, c. 5, provides that parties may make their submission to arbitration a rule of any of his Majesty's Courts of Record (a). The Court of Chancery, though not strictly speaking a Court of Record, yet it has been considered the statute extends to that, as well as to the other Courts in Westminster Hall, and it has been the constant practice of the Court of Chancery to make submissions to arbitration a rule of that Court, under the statute (b). In section 2 the Court of Chancery is expressly recognised, where authority is given, to set aside awards obtained by corrupt means, and by analogy, is presumed, the statute of the 3 & 4 of Wm. 4, c. 42, is held to extend to submissions made a rule of the Court of Chancery (c).

(a) *Supra*, p. 5, statute at length.

(b) Watson on Awards, p. 41, 315; Ormond v. Kynnesley, 2 Sim. & Stu. 15. It is not denied that this Court will invariably enforce an award, which is the result of an order of reference made by this Court, but it is said such orders being matters of agreement, the parties may, if they think fit, exclude the jurisdiction of the Court. The time limited in the bond expired without an award, and an enlargement was by order of the Court, on which award was made, and therefore is made solely by the authority of the Court.

The delegation of a matter by the Court of Chancery to an arbitrator, is making his award equivalent to a decree of the Court, and to impugn it here, would be to dispute the authority of the Lord Chancellor himself. Any complaint should be addressed to that Court, under the circumstances, (which was a reference to an arbitrator as to ascertain whether the plaintiff was entitled to claim interest on a mortgage deed), an application to this Court would be bringing here an appeal from the decision of the Chancellor himself. (*Pitcher v. Rigby*, 9 Price, 79, Richards, C. B.)

(c) As to Witnesses, *vide supra*.

Where a cause is referred at *Nisi Prius*, it is usual to insert in the order of reference, a condition that the parties shall file no bill in equity, either against the arbitrator, or against each other (*a*), the insertion of this condition, has been considered a tacit admission that a Court of Equity had a discretion to entertain a bill for setting aside an award for partiality, though made under such a reference (*b*). It is said that where an application is made to a Court of law without success, against partiality and corruption, recourse may be had to a Court of Equity, for the proceedings under the Court of law may be incompetent, for that which would subvert the award, may arise out of the answer in equity, only, where, the mode of compelling a discovery by answers to pointed interrogatories, has much the advantage of affidavits in a Court of law (*c*).

So also where a submission is made under the statute, and an application for an attachment has been made and refused by the Court, of which the submission was made a rule, and an application to set aside the award has also been refused, then a bill will lie to obtain relief, against partiality and corruption (*d*). The circumstances of this case, by

(a) *Kyd on Awards*, p. 333.

(b) *Lonsdale v. Littledale*, 2 Ves. Jun. 451, *vide* 2 Atk. 155, Bunb. 265.

(c) *Kyd on Awards*, 314.

(d) Bill to set aside an award made by A. and B., two arbitrators out of the three; submission was made a rule of the Court of King's Bench, wherein a rule was obtained to set aside the award, the Court were divided, so the award could not be set aside, and such was the case when a motion for an attachment was made; the party in whose favour the award was made, brought an action on the submission bond, for relief against which Ward filed his bill, praying general relief. The answer insisted the King's Bench had determined, therefore the award ought not to be set aside. Lord Macclesfield, Ch., was in doubt what to do, the matter being wholly a common law proceeding; he therefore referred it to the Master to state what the

Practice of
the Court of
Equity.

consulting the note, will be found to be somewhat singular, though it is much doubted whether the reason given by the Lord Chancellor is one which in the present day it would be safe to adopt, for if it be true, it would follow, that in all cases where the Courts consider the matter too doubtful to grant an attachment, that then, the party against whom the action was brought, could apply to equity for relief, which, it is presumed, they could not do. It is submitted, the refusal to grant an attachment is not, as it were, a rescinding of the order of reference, but in other words, saying there is too much doubt upon the matter to enforce the award by a summary remedy, and therefore the question between the parties must be decided by the verdict of a jury. It is difficult to understand how the jurisdiction of a Court of Equity could arise, for the express enactment of the 9 & 10 Wm. 3, c. 15, s. 1, is, "that an arbitration, &c., shall be esteemed void and of none effect, and, accordingly, be set aside by any Court of law or equity, so as complaint of such corruption or undue practice *be made in the Court where the rule is made for,*" &c., then if the jurisdiction of the Court be limited by the enactment, how shall it be said to act in a matter, wherein the parties have conformed to the statutory regulations. It is more than doubtful whether the case of *Ward v. Periam* could be supported in the present day.

Court of King's Bench had done, the Master stated the above case. His Lordship then was of opinion the Court of King's Bench had not determined either way, not having thought fit to set aside or confirm the award; he therefore held that the case should be considered as an award by submission, without a rule of Court, and that if a Court of Common Law, which had a summary jurisdiction, and refused to exercise it, and if the Court left the party on one side to his remedy by action, it left the other to seek relief by a bill in equity. (*Ward v. Periam*, cited 2 Atk. 155; Kyd on Awards, p. 334, *et seq.*)

Where a submission is made a rule of the Court of Submission, Chancery, motions may be made thereon, as in other rule of Court of Chancery. Courts (a), and awards made thereunder are regulated upon principles similar to those which govern references at Common Law (b), and if the arbitrator does not finally decide the matters contained in the submission the Court will set aside the award (c).

The Court of Chancery, though it may have an original Power to jurisdiction when the submission is made a rule of that relieve against awards. Court, has no power to relieve against an award which has been made a rule of a Court of law, or where the submission contains a clause that it may be so, though it has not been made a rule of the Court at the time of filing the bill (d). In the case of *Nicholls v. Roe* (e), Shadwell, V. C., said, "by Statute, effect of the words of the statute, the inherent jurisdiction of the Court is not taken away, except where the submission has been made a rule of a Court of law, and even in that case it will remain, if the Courts of law will not or cannot act upon the award," which, on appeal, Lord Brougham, Ch., reversed, and said, "the prohibition contained in the statute (9 & 10 Wm. 3, c. 15), is plainly to preclude all reviews of the award at law or equity, except upon the special grounds therein mentioned. He dissolved the injunction (f). Nor will

(a) *Spetigue v. Carpenter*, 3 P. Wms. 362.

(b) *Vide supra*.

(c) *Turner v. Turner*, 3 Russ. 494.

(d) *Davis v. Getty and Others*, 1 Sim. & Stu. 411, Leach, V. C.; "I cannot consider it was the intention of the Legislature to leave it to a party to escape at pleasure from the jurisdiction created by the statute; it is the duty of a person who complains of an award to make it a rule of Court, so as to give the proper Court jurisdiction, and if he fails to do so in proper time, he cannot by his own default create a new jurisdiction here, to defeat the limitation of time as fixed by the statute." *Dawson v. Sadler*, 1 Sim. & Stu. 537, S. P.

(e) 1 Sim. 166, *et seq.*

(f) *Nicholls v. Roe*, 3 Mylne & Keen, 431.

Objection on
face of the
award.

Reference,
effect of.

Injunction,
power to issue.

the Courts of Equity interfere even where there is a palpable objection upon the face of the award; in *Auriol v. Smith* (a) the Vice Chancellor held, that the proceedings to set aside an award must be taken within the time limited by the statute, and that it was not competent for the Court to attend to the objection after that time had elapsed. When an award is made a rule of Court, that Court only of which it is a rule has power over the award (b). In *Nicholes v. Chalie* (c), wherein the parties in two chancery suits agreed to refer all matters in difference, and that the submission should be made a rule of the Court of Queen's Bench; the arbitrator proceeded under the submission, and awarded that nothing was due to the plaintiff, and that the original bill should be dismissed with costs, and that no further proceedings should be had in the cross cause. On a bill being filed in the Court of Chancery to set aside the award for an error apparent upon the face of it, Lord Eldon, Ch., refused to make any order.

A Court of Equity has no jurisdiction to issue an injunction to restrain a party from proceeding to enforce an award

(a) 1 Turner, 125.

(b) *Gwinett v. Bannister*, 14 Ves. Jun. 530. The bill prayed an award might be declared void; the award was under an agreement, dissolving a partnership, and submitting certain claims to the arbitrators, and made a rule of the King's Bench, under the statute of the 9 & 10 Wm. 3. "I have not found by my own research, nor by the information of others, in any case, that a Court of equity has interposed by injunction to stay the proceedings of a Court of law, in which the award was made a rule of Court, and it is difficult to see how that could be under the first section, (534); the words Court of law or equity in the second section, must mean that Court in which the rule was made, and the application must be made within the time limited by the act, and power is not only to refuse to carry into execution, but to set aside (534)." Lord Eldon, Ch. (*Steff v. Andrews*, 2 Madd. 6; *Godfrey v. Boudier*, 2 Vin. Ab. 130, pl. 38, S. P.)

(c) 14 Ves. Jun. 265.

at law, where the submission has been made a rule of Court Injunction, under the statute, and that, though, to administer substantial power to issue. justice between the parties the interposition of a Court of Equity would be necessary (a).

A reason why a Court of Equity cannot interfere to set Reason against aside an award is, that where a Court of law can interfere Court of Equity inter- (as where the application to set aside an award is made in fering with due time), it has power to entertain every ground of relief awards. which, under similar circumstances, could be urged in a Court of Equity (b).

In cases where awards are not within the statutes, the Cases not jurisdiction of the Court of Equity remains as it was before under statute. the statutes were enacted (c). Where an award has been unimpeached for nine years, equity will not interfere, and where the only object of a bill is to set aside an award, corruption and partiality alone will be allowed to be discussed, but if the prayer of the bill be for an account also, then legal objections may be made, in order to let in the account (d). Where an arbitrator undertakes the reference Arbitrator un- upon the agreement that no bill in equity shall be filed dertaking re- against him, the parties will be unable to make him a party ference on condition. to a bill, though fraud and partiality are charged against him, and if he is made a party to a bill under such circumstances, the Court will order his name to be struck out (e).

In the books mention is frequently made with approbation of a maxim adopted from the civil law, "*that that, against which relief is prayed, cannot be pleaded in bar of such relief*"; there are two cases to which this maxim seems

(a) *Gwinnet v. Bannister, supra*; *Stiff v. Andrews, supra*.

(b) *Rex v. J. Wheeler*, 3 Burr. 1258.

(c) *Supra*.

(d) *Champion v. Wenham*, Amb. 245.

(e) *Steward v. East India Company*, 2 Vern. 380; *Anon.* 3 Atk. 664; *Ca. temp. Finch*, 131.

peculiarly applicable, but in which it has seldom prevailed, viz., awards and releases (a).

Arbitrator
defendant to a
bill in equity.

In any case where an arbitrator is made a defendant to a bill in equity, if he is not thereby charged with corruption, fraud, or other misconduct, he may demur (b), but where fraud or corruption is charged against him such charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer, showing he was incorrupt and impartial (c), but to set aside the award the corruption must be proved, merely giving excessive damages, is insufficient (d).

Question of
validity of an
award.

The question of the validity of an award should be brought on, on further directions (e).

Former prac-
tice in the
Court of
Equity on re-
ferences
therein.

Where the submissions was made a rule of the Court of Equity, it was formerly held, exceptions might be made to the award, in the same way as to a Master's report, and if the complaint was that the arbitrator had not considered parts of the matter submitted, the Court would order the arbitrator to certify whether he had considered them (f), but which doctrine is now overruled. In the case of *Dick v. Milligan*, in which there were cross actions (g), a request was made that certain accounts might be submitted to the Court, after much discussion, the Lords Commissioners (Eyre, C. J., Ashhurst, J., and Wilson, J.) held, "that a

(a) See a collection of cases in *Kyd on Awards*, commencing at p. 361, *et seq.*, wherein awards and releases have been allowed in an answer to bills in equity thereon.

(b) *Lingood v. Croucher*, 2 Atk.

(c) *Nybott v. Banel*, 2 Eden. 131; *Pope v. Bish and Another*, 1 Anst. 59; *Edmundson v. Hartley*, 1 Anst. 97; *Evans v. Harris*, 2 Ves. & Bea. 364, Pitford, 209.

(d) *Brown v. Brown*, 1 Ch. Ca. 140.

(e) *Woodbridge v. Hillier*, 1 Bro. Chan. Reports, 398.

(f) *Kyd on Awards*, 342.

(g) 2 Ves. Jun. 24.

reference to the judgment of an arbitrator is a reference to his final judgment, unless there be an imputation upon his conduct," and that there was a great difference between an arbitrator, and a master, "the former is a Judge of the facts without appeal, the latter has only to prepare matter for the opinion of the Court, and in the case of an arbitrator there is no distinction between Law and Equity, and that it would be mischievous, if the Court should lay down a rule that in complicated cases of reference to arbitrators they (the arbitrators) ought to lay all the minute particulars before the Court, in order to make a ground for costs. The summary justice they (the arbitrators) administer is the best, and if the Court does not see a ground for costs there is no great harm."

Arbitration in equity.

There are cases wherein, if on an agreement to refer the solicitor persists in pressing on a suit in Equity, costs will be decreed as in the case of *Ambler v. Tibbut* (a), where several causes and suits in Equity were referred on the trial of one of the common law causes, and the solicitor persisted in proceeding with the suits in Equity, and delivered subpoenas to hear judgment; and set down the causes in the registrar's book for hearing, the Court, on motion, set aside the subpoenas with costs, and directed the causes to be struck out.

Carrying on cause after reference, effect of.

A bill will not lie to compel an arbitrator to discover the grounds on which he made his award (b).

Grounds of decision, bill to discover.

(a) 2 Bea. 442.

(b) 3 Atk. 644, *supra*, as to the jurisdiction of the Court of Chancery.

ATTACHMENT.

Disinclination
of the Common
Law Courts to
grant.

Course in the
Courts of
Equity.

The enforcing an award by attachment is a proceeding of comparatively modern date, and the Courts of law listened with comparative reluctance to such applications (*a*). At first a distinction was made in a case where a party by rule of Nisi Prius consented to submit, and afterwards withdrew his submission before an award was made, and where he afterwards refused to perform the award: in the former case, the attachment was generally granted, because there was no other remedy; in the latter refused, because the party might have his remedy upon the award (*b*). Though the Courts of Common Law were so unwilling to grant an attachment, the Courts of Equity made no scruple (*c*). In *Knox v. Simmons* (*d*) it was decided, where no writ of execution of the order that the award shall stand, has been served upon the opposite party, the motion is, "that he stand committed for non-performance, not that an attachment shall issue against him," the service of this notice of the motion *must be personal*, the reason being, that by the reference the cause is out of Court, but where a writ of execution of the order has been served on the party, motion for attachment may be made, though the submission did not contain any express undertaking to perform the award, or has not been made a rule of Court.

Afterwards the Court of Common Law ran into the opposite extreme, and in all cases (whether void in point of law or not) granted an attachment, on the ground that the refer-

(*a*) 1 Keble, 130, 138, see T. Raym. 35, 152, 2 Keble, 22, 643.

(*b*) 2 Keb. 22, 3 Keb. 844.

(*c*) *Hide v. Pettit*, 22 Car. 2, 1 Ch. Ca.

(*d*) 3 Bro. Ch. Rep. 361.

ence being by rule of Court, there ought to be an attachment for non-performance for it is a contempt of Court (a).

The jurisdiction now exercised by the Courts in granting attachments is twofold: 1st, their ordinary jurisdiction over causes referred by a Judge's order, or a rule of Court; 2ndly, statutable, where the submission by the agreement of the parties is made a rule of Court by virtue of the statute (9 & 10 Wm. 3, c. 15) (b), for before the statute an attachment could only issue when the cause was referred at *Nisi Prius*: but now by its provisions, in all cases where the submission is made a rule of Court, an attachment can issue for non-performance of an award, but before it can issue the submission must have been made a rule of Court, and a copy of the rule must have been served upon the party (c).

Jurisdiction of the Courts in granting attachments.

An attachment is granted whether the contempt of the rule of Court consists in the non-payment of the money awarded, or of the costs (d), or for the non-performance of any act immediate or collateral (e), and the rule in all such cases is a rule to shew cause (f). If the arbitrator's costs have been paid by the applicant there must be an affidavit of such payment (g).

Attachment for what granted.

Mr. Watson seems to say, it is doubtful whether the

Compensation to arbitrator, attachment for.

(a) *Kyd on Awards*, 313.

(b) *Watson on Awards*, 247.

(c) The rule nisi for an attachment for disobedience of a rule of Court against an executor for not accounting, was personally served, but not the rule absolute; several attempts were made, but defendant kept out of the way, and a copy was left at his residence. You must make out a very strong case before the Court will grant an attachment, 3 D. P. C. 703, a rule nisi was granted, which was afterwards made absolute, no cause being shown. *Vide re Fennel*, ib. note (a).

(d) *Hicks v. Richardson*, 1 Bos. & Pul. 91.

(e) *Daniel v. Beadle and others*, 1 M. & G. 960; *Doddington v. Hudson*, 1 Bing. 410.

(f) *Dickinson v. Alsop*, 8 Jurist, 1033, *Pollock, B.*

(g) *In re Smith and Reeves*, 5 D. P. C. 513.

Compensation
to arbitrator,
attachment for.

Court will grant an attachment for the non-payment of the costs of an arbitrator (a). In the case of *Hicks v. Richardson* (b), which was an application for an attachment against one party, by the other, for a moiety of the costs which he had paid to the arbitrator to get the award, and of which payment was refused: Eyre, C. J., said, "should we not have allowed the arbitrator to say on this sort of application: that the costs of the arbitration amounted to so much, and that, by the terms of the award they were to be paid by both parties, and that the plaintiff had refused to pay his moiety. I consider this motion in the same light as if the arbitrator had come to enforce the payment by attachment. On the substantial justice of the case the plaintiff is bound to pay his moiety of the costs: he has submitted by a rule of Court to pay them, and the Court will enforce the payment by attachment. It is a matter of form whether the arbitrator himself applies for the attachment or the party who paid the money to the arbitrators. Buller, J., seemed to doubt, not that an attachment could issue for the payment of the costs of the arbitrator, but whether the payment of the money was, or not voluntary, and after their Lordships had delivered their judgments, Lord Chief Justice Eyre said, "perhaps on strict legal grounds the arbitrator ought to have applied for the attachment to enforce the payment of his costs, but that the Court was unwilling to force arbitrators into the Court. In the later case of *Burroughs v. Clarke* (c), in which the application was by an arbitrator for an attachment to compel the payment of his costs, he not having joined in the award. The parties had paid a certain sum (the sum demanded) to the other arbitrators. Taunton, J., refused to grant the attachment, on the ground, it would seem, of payment, and he concluded

(a) Watson on Awards, p. 248.

(b) *Ubi supra*.

(c) 1 D. P. C. 48.

by saying, "What was said by Eyre, C. J., went beyond the case, and whatever dropped from him was extra-judicial, and I apprehend there is no reason for any such observation."

Though the observations of the Lord Chief Justice were in one sense extra-judicial, yet it would seem *they were the aids by which he arrived at the conclusion he did*, and they therefore must necessarily have more weight, than mere dicta. He distinctly says, though in other words, that if the arbitrator had come himself, and which would be the more proper mode, that they (the Court) would have granted the attachment; and it was only upon the consideration that the applicant stood in the place of the arbitrator, that the application was granted; and with which Buller, J., and the other Judges, agreed. The case of *Burroughs v. Clarke* appears altogether beside the question, for therein the parties had paid the costs, and it would, therefore have been unjust, by a summary mode of proceeding, to compel them to pay again. In the prior part of his judgment, his Lordship intimated a doubt, founded upon the recollection of a decision of Lord Kenyon's, whether an arbitrator could recover his charges, his office being honorary, and from which, it is presumed, Mr. Watson has taken his authority, for the observations contained in his book, viz., "that the Court would not grant an attachment, at the instance of an arbitrator, for his costs." The question as to the power of an arbitrator to recover his costs, is now set at rest by the case of *Haggins and Others v. Gordon and Others* (a), and it would seem not only that the arbitrator can recover his charges, but the umpire also.

A great argument in favour of the grant of an attachment at the instance of an arbitrator for his costs, is, that

(a) *Supra*.

Compensation
to arbitrator,
attachment for.

the Court exercises a surveillance over the costs of an arbitrator, not by directing them to be taxed by the Master, but by some inherent jurisdiction which the Court claims to have over the proceedings of an arbitrator, which, unless they recognised the claim, it is considered they could not have. If, then, it be a claim recognised by the Court, and the Court has the authority to investigate the matter, such authority can only arise out of the act of the Court, viz., by making the submission a rule of Court, and when the submission is made a rule of Court, it is presumed that the proceedings on the submission are a matter as much in the knowledge of the Court as those in an action: the authority conferred being exercised in consonance with that rule, the non-payment of the arbitrator's costs would seem to be as much a breach thereof as the non-payment of the matter awarded, as of the costs, *inter partes*, which has ever been held to be part and parcel thereof; if then, the parties who have paid can apply for, and obtain an attachment, surely he to whom the payment is to be made, should be in the same position. Arbitrators as well as the parties may enforce their respective rights by suit, it appears to be an anomaly to say, that though they as well as the parties can sue for their rights, yet the parties alone shall be entitled to the summary benefit. It does appear to be in accordance with the spirit of the decisions in favour of awards, that an arbitrator should be entitled to his costs, and be enabled to enforce them by a summary application. Lord Chief Justice Eyre's dictum, seem to be the only one, in the books upon this point, for the judgment of Taunton, J. (a), does not appear to have been directed to the particular subject, but to have been decided upon the ground of payment to the other arbitrators.

Attachments a
matter in the
discretion of
the Court.

It is wholly in the discretion of the Courts, whether they

(a) *Supra*.

will grant an attachment (*a*), and before they will do so, the matter must be clear beyond a doubt (*b*).

Upon a parol (oral) award, an attachment cannot issue, Attachment on a parol award. the only remedy being by action; nor where it is reduced into writing, unless it contains a power that it shall be made a rule of Court (*c*); where there is such an agreement, then the Court can enforce a parol award, by attachment (*d*).

In the case of *Owen v. Hurd* (*e*), the parties consented Two awards. to a reference, and which was made a rule of Court, the arbitrator not having completed his award in time, the real parties, (Owen being only the nominal plaintiff,) consented to refer the matter again, which second submission was not made a rule of Court; an attachment was moved for, for the non-performance of the award: the Court held that the award was a mere nullity, the reference not having been made by the parties on the record, both of whom should have consented to the rule of Court; and if the reference Parties referring not parties on the record. had been by the parties, there should have been a second application to the Court, (under the circumstances), to make the submission under which the second award was made, a rule of Court, and the order must have been made by the Court itself, and that the application was for an attachment, for the violation of a rule of Court, when in truth, there was no rule; whereupon the defendant's attorney wished to waive the objection, and to have the Objection of which the Court is cognizant. matter decided upon the merits, which Lord Kenyon, C. J.,

(*a*) "I formerly thought an attachment should be granted *ex debito justicie*, if the motion was made within the time limited: the opinion was hastily formed. It is an authority given by the Legislature to be exercised in a summary manner; but when an award is bad on the face of it, it is reasonable objection should be made on an attempt to enforce it." (*Pedley v. Goddard*, 7 T. R. 77, Kenyon, C. J.) "When it is doubtful whether an award is or is not good, we ought not to grant an attachment." *Grose, J.* (ib. 79).

(*b*) *Smith v. Reeves*, *supra*.

(*c*) 7 T. R. 1 *Ansell v. Evans*.

(*d*) *Rawley v. Wood*, *Barnes*, 54.

(*e*) 2 T. R. 643.

refused to allow, and saying the Court were bound to take notice that they had no jurisdiction (*a*).

Affidavits,
conflicting.

If the affidavits are conflicting, so as to leave any doubt on the mind of the Court, whether the award has been performed or not, it (the Court) will discharge the rule nisi (*b*), and it will be refused, if from the award it appears that the arbitrators have omitted to decide upon any matter submitted (*c*).

Application
for an attach-
ment pending
action.

Where an action was pending, in the Court of King's Bench, for the sum awarded, the Court of Common Pleas refused to grant an attachment, though the party was ready to waive the action (*d*). The practice now appears to be, that if the action be discontinued, and the costs of the action paid, the attachment will be granted (*e*).

Attachment,
application for
after judgment.

The obtaining judgment, in an action on the bond, is no bar to an attachment for the non-performance of the award, for the applicant may think that an attachment is a more expeditious and effectual mode of enforcing his claim (*f*).

Action after
attachment.

So the Court will not stay proceedings in an action of debt on the bond or award, on account of an attachment having been obtained, because, if the defendant dies in execution, the attachment cannot be revived against his heirs or executors (*g*); but if he dies in execution on a judgment, the plaintiff may have execution on his goods (*h*), but when he is taken in execution on the judgment, the attachment is dismissed (*i*); though, in a later case, where an attachment was granted, and the defendant was taken thereon, and afterwards the plaintiff commenced

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- (*a*) *Vide supra*. (*b*) *Hales v. Tayler*, 1 Stra. 695.
 (*c*) *Randall v. Randall*, 7 East, 81.
 (*d*) *Badley v. Loveday*, 1 B. & P. 81.
 (*e*) *Paull v. Paull*, 2 D. P. C. 340.
 (*f*) 1 Salk. 73, 10 Mod. 333; *in re Bower*, 1 B. & C. 264.
 (*g*) *Webster v. Bishop*, Pre. in Cha. 223.
 (*h*) *Patterson v. Gross*, 2 Barnard. B. R. 227.
 (*i*) *Richardson v. Chancey*, 1 Barnard. 386, cited B. H. R. 107.

an action on the award, Parke, B., said, "the plaintiff should be put to his election, and that he ought to let the defendant out of custody, and his Lordship directed the discharge of the defendant if he chose to give a bond to the plaintiff with sureties to the satisfaction of the Master, and which was to be in the nature of a bail bond (a)."

Action after Attachment.

Where an award has been made a long time, four years, and no affidavit is produced accounting for the delay, an attachment will not be granted (b).

Long delay in applying for an attachment.

Where there were no proceedings in Court an affidavit for an attachment need not be entitled in any cause (c), but the affidavits in answer must (d). In a late case, where the affidavits were entitled as between A. plaintiff and B. defendant, no cause being before the Court, Coleridge, J., held the words plaintiff and defendant might be struck out, as mere surplusage, and that the commissioner's signature was not necessary to the erasures (e). When an award is to be enforced by attachment, the affidavit of the attesting witness is necessary or its absence must be accounted for (f). The affidavits in support of an attachment must positively state the matter on which the application is grounded; as where the grievance was the non-payment of the money awarded and the costs: Lord Abinger, C. B., said, "where the affidavits only stated that the plaintiff did not pay the said sums or any part thereof, it is insufficient. If it had gone on to say, or either of them, it might have been sufficient, for it is consistent therewith that the plaintiff tendered the amount of the costs, and a clear case of refusal should be made out (g)."

No proceedings, affidavit for attachment.

Affidavits in support of an attachment.

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- (a) *Lonsdale (Earl of) v. Whinney*, 3 D. P. C. 265.
 - (b) *Story v. Garry*, 8 D. P. C. 299, Patteson, J.
 - (c) *Bevan v. Bevan*, 3 T. R. 601; *Whitehead and Others v. Frith*, 12 East, 105, S. P.
 - (d) *Ib. contra vide Bainbridge v. Houlton and Another*, 5 East, 21.
 - (e) *In re Imeson and Horner*, 8 D. P. C. 651.
 - (f) *England v. Davidson*, 9 D. P. C. 1052, Coleridge, J.
 - (g) *Poyner v. Hatton*, 7 M. & W. 212.

Suit abated by death of defendant.

In the case of *The King v. Maffey*, in the cause of *Maffey v. Goodwin* (a), where the suit had abated by the death of the plaintiff, the Court held they could not grant an attachment, and that the only remedy was by action. The case of *Rogers v. Stanton* (b) was cited, wherein the Court of Common Pleas had granted an attachment, and after death of the defendant: in *Maffey v. Goodwin* (c), Parke, J., said, "the point concerning the attachment in *Rogers v. Stanton* was not well considered.

Affidavit for attachment, swearing.

An affidavit for an attachment may be sworn before a Judge of a different Court than the Court wherein the contempt is alleged (d).

Attachment for the non-production of books, &c.

In the case of *Arkbuckle v. Price* (e) the Court granted an attachment for not producing books, &c., at the requisition of the arbitrator, the reference being of all matters in difference, the submission contained a clause that the books, papers, &c., should be produced.

Non-attendance of witnesses.

So an attachment may issue for the non-attendance of witnesses under the 3 & 4 Wm. 4, c. 42, where the regulations in the statute have been complied with (f).

Overplus, no attachment for.

Where the defendant had paid a certain sum into Court, and the arbitrator awarded that he had thereby overpaid, the Court refused to grant an attachment for the overplus (g).

Demand of costs of two defendants in one allocatur, effect of.

Where A. and B. were defendants, and the matter was referred at *Nisi Prius*, and A. only appeared at the trial, or attended to any part of the proceedings, the arbitrator awarded that nothing was due to the plaintiff. Upon this the Master taxed the costs of the cause, and reference to A., who demanded them, as the costs of the said cause and

(a) 1 D. P. C. 539.

(b) 7 Taunt. 575.

(c) *Ubi supra*.

(d) *Phillips v. Drake*, 1 D. P. C. 538, 11 G. 4, and 1 Wm. 4, c. 79, s. 4.

(e) *Supra*.

(f) *Supra*, p. 7.

(g) *Thornton v. Hornby*, 8 Bing. 13.

reference of the plaintiff, according to the Master's allocatur, which made no distinction between those of the reference and of the trial. Bayley, J., held that but for the mode of taxing and demanding the costs an attachment would have been granted, but upon the allocatur it must be taken for granted, that the Master included the costs of the trial, and reference in one sum, and B. does not negative the payment of those costs to A., the attachment was refused (*a*), where the time was enlarged as in this case it is not necessary to make an affidavit of the enlargement of the time.

Demand of costs of two defendants in one allocatur, effect of.

Whatever would be a good defence to an action upon an award may be shewn for cause against an attachment for the non-performance of an award, though it does not appear upon the face of the award (*b*), but in showing cause against an attachment a party cannot impeach an award for any extrinsic matter (*c*).

Cause against an attachment.

Extrinsic matter.

(*a*) *Dickens v. Jervis and Smith*, 5 B. & C. 531. Where a submission contains a power to enlarge the time, and which is made a rule of Court, it is as sufficient for the purposes of obtaining an attachment as if the award was made within the time originally named, the Court must have the credit of not having made it a rule of Court without a sufficient affidavit.

An attachment for the non-performance of an award may be moved for without an affidavit that the enlargement of the time was duly made, we must presume that the rule which was drawn up upon reading the rule of Court, and the Master's allocatur thereon, was drawn up upon the proper affidavit. (*Barton v. Ransom*, 3 M. & W. 327, Parke, B., *vide Doe v. Amey*, 8 M. & W. 565).

Where a submission contains a power to enlarge the time, and the enlargement is made a rule of Court, it is sufficient to obtain an attachment; the Court must have credit for not making a rule of Court without a sufficient affidavit, otherwise every rule for an attachment for disobedience of a rule of Court, must be by rule nisi. (*In re Smith and Reeves*, 5 D. P. C. 516, Littledale, J.)

(*b*) *Watson on Awards*, 269, *supra*.

(*c*) *McArthur v. Campbell*, 2 Ad. & E. 52. In showing cause against a motion for an attachment for defects not apparent upon the face of the award, a rule must be obtained within the time specified in the act. (*Holland v. Brooks*, 5 T. R. 162).

Award containing a condition precedent dem.

Where an award contains a condition precedent, or directs a concurrent act to be done, it must appear there has been a performance, or a tender of performance of the thing awarded (*a*). In all cases the award must be made in pursuance of the rule of Court to warrant the issue of an attachment (*b*).

Surrender of land.

Where an award directed the surrender of land (copyhold) to be made at the costs of the plaintiff, the Court held it rested with the defendant to prepare the surrender, or give notice of attendance for that purpose, and granted an attachment (*c*).

Delay on demand, performance of award.

Though an award be not served, or a demand made for the money awarded, for some time after the day named for payment, the attachment will nevertheless be granted (*d*).

Corruption in an arbitrator is no defence against a motion for an attachment, though it might have formed the ground of a specific motion to set aside an award. (*Brazier v. Bryant*, 3 Bing. 167; *Doe* on the several dem. of *Madkins* and *Long v. Horner and Roupell*, *supra*, S. P.)

(*a*) *Standley v. Hemnington*, 2 Marsh. 276; *Anon.* 1 Burr. 651.

(*b*) *Reade v. Duten*, 2 M. & N. 70, Parke, B. Submission, with power to enlarge the time by indorsement; the copy of an award served upon the defendant, contained no indorsement. Held, "There did not thereby appear to be any rule of Court authorising an award so as to make it a contempt, nor authority for making the award after the time limited. Without the indorsement defendant had no notice of his offence." (*Davis v. Voss*, 15 East, 98, Lord Ellenborough, C. J.) "It lies upon the applicant for an attachment to show defendant has been guilty of a contempt, by showing he did enlarge the time." *Bayley, J.*, (ib. 99; *Halden v. Glancock*, 5 B. & C. 390, S. P.; *Moule v. Seaple*, 15 East, 99, S. P.)

Reference with power to appoint an umpire, and a clause for the observance of the award of the arbitrators and their umpire; the award was signed by the arbitrators. It did not appear an umpire had been appointed; the words are not that they or their, but they and their umpire, held too doubtful to grant attachment. (*Hetherington v. Robinson*, 4 M. & W. 608, Parke, B.)

(*c*) *Doe* dem. *Clarke and Another v. Stillwell*, *supra*.

(*d*) *In re Cracke and Others*, 7 D. P. C. 603. For non-payment of

Where the arbitrator directs a verdict to be entered for the plaintiff, he not having power by the submission to do so, an attachment will not thereon be granted. Lord Denman, C. J., in delivering the judgment of the Court, said, "the decision of Littledale, J., in *Cartwright v. Blackwell* (a), favoured the view that the entry of a verdict was tantamount to an order that the defendant should pay so much to the plaintiff, but the case of *Jackson v. Clarke* (b) is opposed thereto, and his Lordship said, had he known of the case he should not have decided as he did" (c). A person making a demand of payment of the sum awarded must be careful not to demand more than he is entitled to, or the application for an attachment will be refused (d). So if a sum awarded, be reduced in amount, the demand must still be of the sum due, and a demand of the original sum before the reduction is not sufficient to warrant the issue of an attachment, there must be a specific demand of the exact sum for the non-

Delay on demand, performance of award.

Demand of more than due.

money, the award directed the payment to Cracke of 175*l.* 3*s.* 5*d.*, on a day named; the award was not served, nor a demand made until six months after the day mentioned for the payment, which being by the laches of Cracke, it was contended he should be left to his action thereon. "There is nothing objectionable done or omitted, it is a continuing duty for the unsuccessful party to pay the sum awarded, and time given beyond the period is an indulgence, but the duty to pay remains in force, if there was a restriction as to the day it would be different, attachment must issue." (605). Williams, J.

(a) 1 Dowl. P. C. 489.

(b) 13 Price, 208; M'Clel. & Y. 200.

(c) Donlan and Others v. Brett, 3 Ad. & R. 347.

(d) The terms of reference were, that the costs of the action were to abide the event of the award; the arbitrator awarded the costs of the reference also. In order to support an attachment, applicant must show that he has demanded what is due to him, if he demands more, there is no failure of compliance; does this submission include the costs of the reference? Rule discharged. (*Smith v. Rogers*, 7 Taunt. 212, Gibbs, C. J.; *Dickens v. Jervis*; *Whitehead v. Firth*, 12 East, 167, Mich. Term, *supra*, S. P.)

Deduction
from amount
awarded.

payment of which the attachment is applied for (a). From the case of *Smith v. Johnson* (b), it would appear, for any cross demand a deduction may be made from the sum awarded, if the subject of such demand was clearly a matter not within the submission, because the party must bring his whole case before the arbitrator, and has no right to reserve any particular part, or thing (c).

A person not
a party to a
submission,
application of.

An attachment to enforce an award will not be granted upon the application of a person not a party to the submission (d).

Enlargement
of time, attach-
ment against
executor.

Where a submission is made by a Judge's order, and the time is also enlarged by a Judge's order, it must be shewn by affidavit, that the enlargements were duly made before an attachment can issue. The Court will not grant an attachment against an executor for the non-performance of an award against his testator, because the contempt is personal, and it would be an improper mode of trying the question of assets (e), so also when the submission contains a clause that the matter shall survive to the executor (f). Where an executor, or administrator submits disputes in such right to arbitration, he is amenable to the same rules as other persons, for such a submission without reservation is a confession of assets (g), the award must be that the executor shall pay in order to warrant the issue of the attachment (h). An attachment for the non-performance of an award cannot be moved for, nor cause be shewn against it on the last day of term (i). If the sum awarded to the successful party, be

Motion for,
when to be
made

Money due,
attachment in
London.

(a) *Spivey v. Webster*, 1 D. P. C. 696.

(b) *Supra*.

(c) *Supra*.

(d) *In re Skets and Others*, 7 D. P. C. 618, 2 W. W. & H. 49, S. C.

(e) *Willes*, 315, *Newton v. Walker*.

(f) *Tyler v. Jones*, 3 B. & C. 144.

(g) *Worthington v. Barlow*, 7 T. R. 453, *et supra*.

(h) *Pearson v. Henry*, *supra*.

(i) *Anon.* 1 Bun. 651.

attached in London for a debt due by him to another person it would appear (a) such attachment is no defence against a rule for an attachment for contempt, because, when a submission has been made a rule of Court it has the effect of a judgment, which cannot be defeated by a process issued out of an inferior Court (b). In *Grant v. Harding* (c), wherein the money was attached, Lord Mansfield said, "I think the proceedings in the City Court were erroneous, and the defendant cannot be allowed anything in respect of the sums paid upon the city process, but must pay the whole to the plaintiff without prejudice to his recovering the money back again from the persons to whom he has paid it. In *Coppell v. Smith* (d), which also was a cause where a process had issued out of the Mayor's Court, to attach a sum of money, due for costs, awarded upon the Master's allocatur, the Court were of opinion, it being a judicial act, the City Court had no power, and Buller, J., said, that money awarded under a rule of Court could not be attached. Money due, attachment in London.

When a person is attached for the non-performance of an award, and becomes bankrupt, the certificate is a discharge of the matter (e); but if the attachment had been for costs, not taxed at the time of his bankruptcy, of them, the certificate would be no discharge, for they are not a debt, until ascertained by the Master, unless in the case of a verdict, for there the costs follow of course (f). Bankruptcy after attachment.

When the award finds a sum of money, due from A. to B., but contains no express order to pay, the Court will not pay. No order to pay.

(a) Watson on Awards, 270.

(b) Culla v. Elgood, 2 Dowl. & Ry. 193.

(c) 4 T. R. 312, (u).

(d) 4 T. R. 312.

(e) Baker's case, 2 Stra. 1152.

(f) Rex v. Davis, 9 East, 318, vide Beeston v. White, 7 Price, 209, et supra.

Verdict.

thereon grant an attachment, for the defendant cannot be shewn to have disobeyed the award (*a*). It was held a direction to enter a verdict for a certain sum, was equivalent to an order to pay (*b*), but which has since been overruled (*c*).

Attachment,
what.

Interest on a sum awarded, cannot be recovered by attachment (*d*).

An attachment for the non-performance of an award, though formerly it was thought to be otherwise, is only in the nature of a civil process, it cannot be executed on a Sunday (*e*). So the Court will not grant an attachment against a peer (*f*), or a member of Parliament (*g*), nor against a corporation generally, or against its individual members (*h*), nor against a public company (*i*). It is no objection to the Court granting an attachment, that the defendant is out of the jurisdiction, or that the serving of the award and the rule of Court was made out of the jurisdiction (*k*).

Trustees, when they enter into references generally, such a reference is a confession of assets, as in the case of the

(*a*) *Eagell v. Dallimore*, 3 Bing. 634; *Hopkins v. Davies*, 1 Crompt. & Rosc. 846, S. P.

(*b*) *Cartwright v. Blackworth*, 1 D. P. C., 489, Littledale, J.

(*c*) *Seaward v. Howey*, 2 Ad. & E. 344; *Doulan v. Brett*, 2 Nev. & M. 854; *Hayward v. Phillips*, 1 Nev. & P. 289, wherein it has been held that a decision to enter a verdict by an arbitrator without authority is an excess.

(*d*) *In re Churcher*, 2 B. & Adol. 777; *Doe v. Squire*, 2 Dowl. N. S. 327, *supra*.

(*e*) *Rex v. Myers*, 1 T. R. 266, *et vide Rex v. Curwen*, J. B. Moore, 494.

(*f*) *Walker v. Lord Grosvenor*, 7 T. R. 171.

(*g*) *Catmur v. Sir E. Knatchbull*, 7 T. R. 448.

(*h*) *London v. Lynn*, 1 H. Bl. 208; *Bishop of Chester v. Harwood*, 1 T. R. 652.

(*i*) *Glynn v. Corpe*, *supra*.

(*k*) *Hopcroft and Others v. Termor*, 1 Bing. 378.

trustees of an insolvent debtor, who referred certain matters, Verdict.
and the Court granted an attachment against them (a). In
Davis v. Ridge (b), it was held, that trustees do not render
themselves personally liable, by the submission of matters
relating to the personal estate to arbitration. It is presumed
that, in the prior case, the trustees did not shelter them-
selves beneath the stipulations contained in the statutes
relating to insolvent debtors.

In Chancery, where a reference is by a rule of that Court,
the attachment will be granted, without first making the
order a rule of Court (c).

A personal knowledge of an award is a sufficient notice for Personal
knowledge of
award.
the purpose of obtaining an attachment (d).

The affirmation of a Quaker is sufficient to ground an Affirmation of
a Quaker.
attachment for the non-performance of an award (e).

A rule for an attachment is in the first instance a rule to Opening rule
for an attach-
ment.
show cause (f). The Court will not open a rule for an
attachment on an affidavit of him in contempt that he has
not been served (g). If no cause is shown, on affidavit of
the personal service of the rule nisi, the Court will make it
absolute. A rule for an attachment cannot be drawn up
on an unstamped award (h).

A person, on being attached, is not entitled to his dis- Person
attached, ten-
der of amount,
charge, on tendering the sum awarded to the officer (i), for
the attachment issues, not because the money is not paid, or
the thing awarded to be done done, but because the party

(a) *Wandborough v. Wandborough*, Dyer, *supra*.

(b) 1 Esp. Rep. 101.

(c) *Ormond, Marquis of, v. Kindersley*, 2 S. & S. 15.

(d) *Supra*. In re Bower.

(e) *In re Gillibrand*, 1 Dowl. & Ryl. 121.

(f) *Gifford v. Gifford, Forrest*, 80; *Rex v. —*, 2 Chitty, 57.

(g) *Hopley v. Granger*, 1 Bing. N. R. 256.

(h) *Supra*, p. 146, note (b).

(i) *Pitt v. Combe*, 3 Nev. & Man. 212.

Person
attached, ten-
der of amount.

offending has contemptuously disregarded a rule of one of her Majesty's Courts of Record, and the attachment is for the purpose of bringing such person before the Court, in order that he may receive sentence, and purge the contempt. In one case, where the contempt was filing a bill in Equity, contrary to the provisions of an order of reference, the Court directed the person to pay all the costs, as between attorney and client, both at law and in equity (*a*); and in another case, where the defendants, by the ill faith of the plaintiffs, were driven into equity, costs were likewise awarded against the plaintiffs (*b*); and in another case, the

(*a*) In *Rex v. Wheeler*, 3 Burr. 1258, the Court said, that the attorney and counsel were equally guilty of a contempt and more criminal, and if it ever happened again, they would proceed against them.

(*b*) *Morgan and Another v. Miller and Another*, 6 Bing. N. C. 108. *Nisi prius*; verdict for 10,000*l.*, but no execution was to issue until default should be made in payment of a sum awarded by a Master in Chancery, to whom cause and suit in Chancery was to be referred: a Mrs. Farden consenting to become a party to the rule; a rule nisi was obtained by plaintiff to set aside the order of reference and proceed to a new trial, and by defendant, for an attachment against plaintiffs, for not obeying the rule of reference. The action arose out of a bond given for 5000*l.*, payable by instalments, for the purchase of a solicitor's business, 2000*l.* of which remained still due, and which bond was for the benefit of the widow and children, the widow, Mrs. Farden, married a second time. Plea, the bond was obtained by fraud, whereon issue was joined, and the defendant filed a bill to obtain a deduction from the amount of the consideration, on the ground that Mrs. Farden (a second time a widow) had not acted consistently with her undertaking in regard to the business and the clients of Mr. Whitton. The plaintiffs, by affidavit, insist they have endeavoured to effect the arrangement made by the order of *nisi prius*; and defendants, on the contrary, insist they have acted with bad faith and have endeavoured at every step to defeat an arrangement. "From such affidavit we can draw no conclusion; from the examination of the proceedings in Chancery, we think the defendant's affidavits correct, and therefore attribute the failure of the completion of the arrangement to the wilful default of plaintiffs; as the

Court fined the plaintiff and his attorney 50%, for a contempt Person attached, tender of amount. for the non-performance of an award (a), when a person is reported by the Master to be in contempt, such report is in the nature of a conviction, and the Court will allow affidavits to be filed in mitigation, but not in denial (b).

In Chancery, when a person is in contempt, the motion is, that the person stand committed, of which, notice must be personally served (c).

fund sought to be recovered is one in the hands of the trustees and in which infants are interested, we think we should not be justified in refusing the plaintiffs liberty to try the cause, but the costs of the useless attempt in Chancery, shall be paid by the plaintiffs and Mrs. Farden. On decreeing rule absolute for the plaintiffs, we do so on consideration of their paying the costs of the day of the trial at nisi prius, and the payment by the plaintiffs and Mrs. F., of the costs incurred by the defendants in the several motions made in this Court; and with respect to the rule for attachment, we direct the same to stand over and be enlarged, and to stand over as a security for the payment of costs." (170, *et seq.*)

(a) *Coulson v. Graham*, 2 Chit. Rep. 57.

(b) *Ibid.*

(c) *Knox v. Simmonds*, 3 Bro. Ch. Rep. 359, for other matters relating to attachment, *vide supra*.

JUDGMENTS, AND THE 1 & 2 VICT. CAP. 110.

Judgment,
submission of,
to arbitration.

What question
on judgments
may be re-
ferred.

A judgment is a matter of record, and it is said in the old writers, that a judgment cannot be submitted to arbitration (a). In *Roberts v. Marriott* (b), it is laid down, "where all debts, sums of money, and demands, are submitted, be they due by bond, judgment, execution, or extent, the arbitrators have computed them, and they are within the submission, and, therefore, as the arbitrators have power to make their award concerning the debts themselves, by the submission, so, consequently, they have power to award the rate of specialties, judgments, &c." from this case, it would appear, a judgment is within the cognisance of the arbitrator, not, as is presumed, to review the judgment, for that would be making the arbitrator to sit in error upon the judgment, but to ascertain what amount is due thereon, or to direct a release. Mr. Watson (c) says, "that a party might refer the question, whether or not a judgment is *erroneous*, or void, or satisfied, or has been fraudulently obtained:" these matters, with the exception of the first of them, would appear to be fairly within the scope of the arbitrator's power, but the first, it is presumed, is open to a doubt, for it would appear that, when a judgment is properly entered, it must be assumed to be the act of the Court, and is a conclusion of law upon the premises previously stated upon the record: for the reasons given above, it would seem doubtful whether

(a) Roll. Abr. (S.) pl. 6.

(b) 2 Saund. 190.

(c) Watson on Awards, p. 46.

the arbitrator has jurisdiction to open the matter, so as to bring the correctness of such judgment under review. A mere question, as to whether the party had a right to enter up judgment of *nil dicit*, or such proceeding, before the cause was really at issue, may be a proper question for the arbitrator, but not where the judgment has been signed after issue joined, or is the effect of a verdict, for in such case, if there be any informality, the Court, on application, will set it aside, with costs (a), and in the case of a judgment which have been signed upon an award, the motion to set aside the judgment will be entertained after the time has elapsed wherein the party should have moved to set aside the award (b).

What question on judgments may be referred.

“It is often a matter of convenience, and in furtherance of justice, at *Nisi Prius*,” to refer the matter, “to be settled by an arbitrator, a verdict is therefore taken *pro forma*, subject to the award of the arbitrator, but after the arbitrator has ascertained the sum to be recovered, such finding is in place of the verdict, and must be considered to be the same as if the jury had originally found so much to be due, and then all the same consequences ensue; the plaintiff is only entitled to enter up his judgment for so much, which, if found by a jury, judgment might be entered after the first four days of the next term, and execution might be sued out immediately afterwards, in such case application need not be made to the Court for permission (c); nor to enable the successful party to do so, need there be a personal service of the award, previously to execution (d).”

Reference at nisi prius.

Service of award not necessary.

Where an award is not made until several terms after the reference, it does not, as a matter of course, have relation

Entry of judgment *nunc pro tunc*.

(a) *Blanchenay v. Van Den Burgh*, 1 Brod. & Bing. 298.

(b) *Brooks v. Parsons*, 13 Law Journ. 50.

(c) *Lee v. Lingard*, 1 East, 401, Lord Kenyon, C. J.

(d) *Borrowdale v. Hitchener*, 3 B. & P. 245, Lord Alvanley, C. J.

Entry of judgment, *nunc pro tunc*.

back to the time when the reference was made, so as to enable the plaintiff to enter up judgment as of the term next after the assizes. Patteson, J., held, that the allowance of such a proceeding was a matter for special application, as when a verdict is taken, subject to a special case (a).

Day named in award for payment of money, execution, when.

Where a certain day is named in the award for the payment of the money, though judgment may be entered immediately, yet execution must not be issued before the day particularized, or it will be set aside as an irregularity (b).

Refusal of arbitrator named to proceed.

Where a verdict was taken at the trial, subject to a reference, the gentleman named, had been engaged in the cause, and from motives of delicacy, refused to go into the case, the Court directed, that unless the defendant would consent to the appointment of another arbitrator, that the plaintiff should proceed to judgment and execution (c).

No direction of a verdict to be entered.

In an action of replevin, wherein there were four issues (the costs of the cause were to be, as if tried) on three of which the arbitrator found for the plaintiff, and one for the defendant, and 12*l.* 10*s.* due for rent, but directed no verdict or judgment to be entered, the costs were taxed, but the Court held that the defendant in replevin could not sign judgment for the award and costs (d). A defect upon the face of an award may be taken advantage of to set aside a judgment, as well as to prevent an attachment, though after the time allowed by the statute for that purpose, and an objection grounded on such a default need not be stated in the rule nisi (e).

Setting aside judgment for defendants on face of award.

(a) *Brook and Another, Assignees, v. Fearn*, 2 D. P. C. 144.

(b) *Callam v. Paterson*, 4 Taunt. 319.

(c) *Wooley v. Clarke*, 2 Dowl. & Ryl. 158.

(d) *Grundy v. Wilson*, 7 Taunt. 700.

(e) *Manser v. Heaver and Another*, 2 B. & Adol. 295.

In a case before the abolition of arrest, where a verdict ^{Judgment} was taken by consent, subject to an award, it was held ^{against bail.} judgment could not be signed against the principal, for the amount of the sum awarded, without first obtaining the usual rule, and where judgment was so signed against the principal, and afterwards proceedings were taken to fix the bail, the Court set aside the proceedings on an affidavit by them, that they had no notice of such judgment until the issue of the writ of *ca. sa.*, when they applied to vacate the proceedings (a).

Where an order of reference directed that a person in whose favour an award was made should be at liberty to sign ^{Construction of terms of submission.} final judgment, to tax his costs, and issue execution for the amount payable thereunder. It was held that the award being in the favour of the defendant, the terms of the order applied to him, and that he might sign judgment for his costs (b).

Before the passing of the statute of the first of Victoria, ^{Remedy under 1 & 2 Vict. c. 110.} c. 110, the remedies for enforcing the performance of awards were by attachment and by actions upon the award, now by the 18th and 19th sections (c), the Court have authority

(a) *Hayward v. Ribbans*, 4 East, 309.

(b) *Maggs v. Yorston*, 6 D. P. C. 481.

(c) Sect. 18. "That all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of Common Law with respect to matters depending in the same Courts shall and may be

Remedy under
1 & 2 Vict.
c. 110.

to order a person by rule of Court to pay a specific sum awarded by the arbitrator to be paid by him, and on such a rule being made absolute, execution will issue against such person, for the amount so specified in the rule. In the case of *Doe v. Amey* (a), it was objected the Court had no power

exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

Sect. 19. "That no judgment of any of the said superior courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."

(a) *Doe v. Amey*, 8 M. & W. 565. Action for mesne profits on an ejectment, referred with all matters in difference, to make an award and power to enlarge the time, submission to be rule, &c., and costs of reference and award to be in the discretion of the arbitrator. All proceedings to be stayed and each pay his own costs, and that defendant should pay plaintiff 1850*l.*, together with the costs of the reference and the award.

Byles obtained rule, why defendant should not pay, &c.

"No sufficient ground has been shown to prevent making this rule

under the statute, or at common law, to make an order, calling upon a person to pay a sum awarded by an arbitrator, and that the 1 of Vict. c. 110, did not confer upon the Court any new power; it was also objected that the application was premature, the time not having elapsed for moving to set aside the award. Lord Abinger, C. B., "held the application was not premature," and to the first objection his Lordship replied, "that the act abolishing imprisonment for debt was made principally for the benefit of persons subject to arrest, and in lieu of imprisonment substituted the more efficacious mode of proceeding against their property, with that view it has made all orders of Court and directions for parties to pay money, equivalent to judgments, and enforceable by execution. The plaintiff is at liberty to apply to set aside the award, and if he succeeds the present execution will be nugatory."

"The execution cannot issue upon the rule of Court, for the sum awarded by the arbitrator without application being first made to the Court for a rule calling upon the other person to shew cause why he should not pay a certain sum of money, pursuant to the award. If that rule be made absolute,

Remedy under
1 & 2 Vict.
c. 110.

Application to
the Court for
rule under the
statute.

absolute; the main ground of reliance is, that the 1 & 2 Vict. c. 110, s. 18, does not authorize the Court to call upon a party by rule to pay a specific sum of money pursuant to an award; when the power of arrest by mesne process was abolished by that statute, it became necessary in lieu of the imprisonment of the persons of the debtors, to provide more ready means than had previously been known to the law of coming at their property, and with that view, the statute made all rules and orders of Court containing directions to parties to pay money as equivalent to judgments, and like them, enforceable by execution; an attachment against a person for non-payment of money, appears to me to suppose a power in the Court to direct him to pay it, though the practice has been to apply for the attachment in the first instance. As to the necessity for an affidavit of the due enlargement of time, it is required on motion for attachment, for that is a process against the person." (Lord Abinger, C. B., *rules absolute*.)

Rule for the
issue of exe-
cution under
the statute.

then execution may issue for the sum distinctly specified in the rule so obtained." Before laying down this rule (which was much approved of by the Court of Exchequer in the case of *Doe v. Amey*)(a). My Lord Denman, C. J., said, "these rules (under 1 & 2 Vict. c. 110,) are to have the effect of judgments, &c., which are to charge the land, therefore the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that purchasers or creditors may know what it is"(b). And where a *fi. fa.*, which was irregularly issued as above, was executed, an action of trespass was held to lie against the persons executing it (c).

(a) *Supra*, p. 252.

(b) *Jones v. Williams*, 11 Ad. & E. 175. To set aside a *fi. fa.* for inequality, and after notice of trial all matters, &c. were referred; award, verdict to be entered for defendant, and that 69*l.* 8*s.* 11*d.* was due to him from plaintiff, and costs, no judgment was entered, but after the award was made the order of reference was made a rule of Court, and costs were taxed, and a *fi. fa.* issued for 69*l.* 8*s.* 11*d.* and costs, amounting to 308*l.* 8*s.* 11*d.* Lord Denman, C. J., said, (178) "The question depends on the construction of the statute 1 & 2 Vict. c. 110, s. 18, (which relates to decrees in equity and rules of Court having effects of judgment). The rule, on which it is contended execution may issue, embodies the submission to arbitration, be it what it may, in no instance of submission to arbitration is any money whatever payable by the rule, and the question is, whether if money be awarded, it becomes payable by the rule, by reference to it by consent of parties that an award may be made embodying an award made by consent into the rule by relation, as if the award itself was part of the rule, and when it goes to make it payable by the rule within the meaning of the act, it is money payable by something arising out of the rule. The defence which presents itself is, no sum, expressed to be payable by the rule itself. These rules are to have the effect of judgments, which are to charge lands, therefore the sum to be charged should be distinctly stated in the document. We think the power of issuing execution on a rule must be confined to cases where the money payable by the rule is expressed in the rule." (178).

(c) *Jones v. Williams and Others*, 8 M. & W. 349. Action for trespass; plea, reference setting out award, and that a sum was due to

These cases are analogous to that of *Gibbs v. Pike and Another* (a), wherein it was held, that an order by the Master of the Rolls for payment of money into the Bank, in the name of the Accountant General, &c., is not an order to which the effect of a judgment is given by the statute.

Rule for the issue of execution under the statute.

In the case *Mendell v. Tyrrel* (b), it was held, that a rule of Court, under this statute, was analogous to an attachment, under the old law; it was objected that the plaintiff had filed an affidavit of debt in the Court of Bankruptcy, (under section 8,) and that such a step was an election, and that the Court would not interfere. The Court notwithstanding made the rule absolute, on the plaintiff undertaking not to bring an action on the award (c).

Analogy to attachment.

defendant ordering plaintiff to pay it; issue of writ, delivery to sheriff, and levy, concluding with a verification. Replication, that it had been ordered that the said writ and *fi. fa.* should be set aside for irregularity, with costs, verification: rejoinder, replication ought not to be allowed, &c., because the writ was by Judge's order, ruled to be returned by plaintiff, to which there was a demurrer.

"The replication *prima facie* is a good answer to the plea, a party justifying under a writ cannot do so, unless he shows a valid judgment. I am of opinion, with respect to costs, it is enough if they are ascertained by the officer of the Court. Ruling the return of a writ does not estop showing the writ was set aside; filing of record does not affirm the existence of a void writ." Parke, B. "In the case of an award, it would be monstrous to say that any sum of money is payable under the order of the Court, which is the submission to arbitration; the sound rule is, that no execution should issue until the Court has ascertained for itself the property of the award, and has made an order for the payment of the money awarded." Alderson, B. (360). "Execution under 2 & 3 Vict. c. 110, cannot possibly extend to the payment of money, which has not in terms been ascertained by a decree or order." Rolfe, B. (361).

(a) 8 M. & W. 228.

(b) 1 Dowl. N. S. 455.

(c) *Mendell v. Tyrrel*, 2 Dowl. N. S. 453. Rule, why payment should not be made of costs and sum awarded; subsequent to award, plaintiff filed an affidavit of debt in the Court of Bankruptcy, under

Analogy to attachment.

It is only in cases where the reference is at *Nisi Prius*, wherein the verdict is entered, subject to a reference, that judgment can be signed, and as the finding of the arbitrator is to be considered as that of the jury, and is to follow all its incidents (a), a necessary consequence is, that judgment cannot be entered until the term next after the finding of the arbitrator, for we have seen, that to enter up judgment as of the term next after the submission, (where the award has not been made until several terms after,) requires the express leave of the Court; in cases where the award is made before the term next following, it is presumed the arbitrator would have no power to direct speedy execution, (unless he was empowered to act as a Judge at *Nisi Prius*,) for it cannot be said to be a consequence of his office: but it is not necessary to wait the lapse of the time which is allowed to apply to set aside the award, before the signing of judgment, though it is doubtful whether the proper time wherein judgment could be entered on the verdict, can be anticipated. The remedy, under the 1 & 2 Vict. c. 110, being analogous to the proceedings for an attachment. If the award was made in term time, it would seem, that as an attachment, on compliance with the necessary forms (b), can be moved for im-

1 & 2 Vict. c. 110, s. 18; the defendant entered into a bond with sureties, &c., conditioned to pay, &c., but omitted the alternative of surrendering, &c., no further proceedings were taken but the present rule was obtained. It was objected that the defendant had elected to enforce the award in the Court of Bankruptcy, and therefore this Court will not interfere. (454). "The plaintiff is entitled to make this rule absolute, if any action had been commenced, the facts should have been shown; rule absolute on the plaintiff undertaking not to bring an action on the award." Lord Abinger, C. B. (455). "A rule of Court, under this statute, is analogous to attachment under the old law, and if plaintiff had commenced an action, the authorities cited would have been in point." Parke, B. (456).

(a) *Lee v. Lingard, supra.*

(b) *Supra, Attachment.*

mediately, so could application be made under the 1 & 2 Vict. c. 110; but where the award is made in the vacation, it is presumed, unless the order of reference contains the power as above, that judgment could not be signed, unless the time for the entry of the judgment upon the verdict had elapsed, or application had been made to the Court. Analogy to attachment.

In order to authorize the Court to issue execution under the statute, there must be a service of a copy of the award, and of the Master's allocatur, or the rule will be refused (*a*). In a case where the time was enlarged, in accordance with the power contained in the submission, it was urged, that the order of reference being made a rule of Court, and the enlargements of the time being contemporaneously verified, fresh affidavits were unnecessary, in order to proceed under the statute, Patteson, J., held, though "it seemed not necessary, yet it would be safer to draw up the rule, on reading the affidavits filed, when the order of reference was made a rule of Court, and on reading the affidavits on which the motion was made (*b*). Preliminary steps.

Where there is a doubt as to the validity of the award, the Court will not interfere (*c*). Doubts as to validity of award.

(*a*) *Pearson v. Archbold*, 11 M. & W. 109. Motion for a rule calling upon the plaintiff to pay money due and the taxed costs, with a view to issue execution under 1 & 2 Vict. c. 110, s. 18, the affidavit did not contain any statement that the award and allocatur had been served upon plaintiff. "I think there should be an affidavit of the service of the award." Lord Abinger, C. B., rule refused.

(*b*) *Peebles v. Hay*, 8 Jurist, 338.

(*c*) *Spence v. Clarkson*, 1 Dowl. N. S. 837. To issue execution on an award pursuant to 1 & 2 Vict. c. 110, s. 18; when this rule is made absolute it is final on both parties, and it is doubtful whether a person is entitled thereto *ex debito*, &c. "If it is uncertain whether the award is good, the Court will not interfere, without precisely deciding the award is bad, there is too much doubt for me interfere." Wightman, J. (840).

Reference of
amount of
damages, issue
for nominal
damages.
Service of rule
under statute.

When the amount of the damages alone is referred, the Court may interfere, and allow execution for nominal damages (*a*). The service of the rule under the statute should be personal (*b*); but if the party is unable to serve it, on application to the Court, it will be enlarged; and it was also held, that it was not necessary to state the waiver of the remedy by attachment in drawing up the rule nisi (*c*).

(*a*) *Porch and Another, Assignees, v. Hopkins*, 1 D. & L. 881. Debt; pleas, general issue; payment, set-off; 200*l.* mutual credit, and Statute of Limitations; verdict, subject to a reference; costs of action to abide the event: of the reference to be in the discretion of arbitrator; award for plaintiff on all the issues, damages 14*l.* 10*s.* 4*d.*, and as to matters in difference not included in the action, he declared bankrupts were indebted to defendant in 100*l.*, and were entitled to prove for that amount against the estate, each to pay their own costs; this award was set aside. From affidavits, it was proved large dealings had taken place between the bankrupts and the defendants, and because the 100*l.* was omitted in the particulars, that it was not to be allowed in the set-off. Motion was, why plaintiff should not issue execution for a nominal debt and damages with costs unless defendant would consent to refer again to the arbitrator. "Whether a plaintiff should be allowed to issue execution for nominal damages is a question for the Court in each particular case. This case comes before me owing to the error of the arbitrator; shall I compel the party to go before him a second time? I think not; he has a sound and valid objection, for the arbitrator may err again. Where the amount of damages alone is referred, the Court may interfere and allow execution for nominal damages, because the plaintiff is entitled to something." *Williams, J.* (884).

(*b*) *Jordan v. Berwick*, 1 Dowl. N. S. 271. The service of the rule (under 1 & 2 Vict. c. 110) should be personal; if it cannot be served, you may come to the Court again upon a special statement of the facts, and such a service may be allowed as shall seem proper." *Patteson, J.* (272).

(*c*) *Burton v. Mendizabel*, 1 Dowl. N. S. 336. Motion to show why defendant should not pay a sum of 1773*l.* 2*s.* 3*d.* pursuant to an award, application was made for the purpose of obtaining a rule absolute pursuant to 1 & 2 Vict. c. 110, s. 18, whereby it would have the effect of a judgment. Motion for attachment would be useless, defendant

Where it is desirable to file an affidavit of debt, in the Court of Bankruptcy, upon an award, it should state the fact of the submission, making the award, and that the money was due at a day now past (*a*). Filing affidavit
of debt in Court
of Bankruptcy.

being at Madrid. It was submitted, it was necessary to make it part of the rule that plaintiff should be at liberty to issue execution. (When the rule is made absolute it will have the effect of a judgment, and execution will follow of course. Pattleson, J.) There would be a difficulty to serve the rule, the plaintiff being at Madrid; it would be desirable there should be a power to suspend the rule. (You had better take the rule nisi, and when due, if you are unable regularly to serve it, you may apply to enlarge it. Pattleson, J.) On a subsequent day, application for enlargement was made, as to former rule, would it be necessary to state in it that a party forwent his remedy by attachment, he being in a situation to apply for it, if a personal service could be effected. The undertaking had been introduced into the rule nisi, and the consequence would be, the plaintiff would lose his attachment altogether. It is not necessary to make it part of the rule nisi, that the applicant foregoes his proceedings by attachment; enlarged rule may be amended and served accordingly. (Pattleson, J., 1337. *Vide Jones v. Williams*, 11 Ad. & E. 175; *Doe v. Amey*, 9 D. P. C. 702.)

(*a*) Anon. 1 Dowl. N. S. 6.

PRACTICE.

Reference at
nisi prius.

When a cause is called on at Nisi Prius, it may be referred by an order of Nisi Prius. As soon as this is effected, the counsel engaged in the cause indorse their briefs accordingly, and hand them to the associate, who thereupon draws up the order. At the same time, it is usual to have the jury sworn, and to take their verdict for the plaintiff for the amount of the damages laid in the declaration, subject to the award; this is essentially necessary in bailable actions, for otherwise the bail would be discharged by the reference (a).

If the award be at all likely to be under 20*l.*, or likely to be such in other respects, as would require the certificate of the Judge, if the cause had been tried, to give the parties costs, care should be taken that a power be given to the arbitrator, by the order, to certify in the same manner the Judge might have done (b).

Order of re-
ference, how
obtained.

The rule is obtained upon two motion papers, on which the terms of the reference are indorsed shortly thus: "Referred to Mr. ——— on the usual terms; award to be made on or before the ———," adding if necessary such other terms, not included in the usual printed form of the rule, as may be agreed upon. Get these signed by counsel, and take them to the Master's Office, and the clerk there will thereupon draw up the rule.

(a) 2 Saund. 72 a.

(b) See Wallen *v.* Smith, 5 Mees. & W. 159; Deever *v.* Swabey, 10 Law J. 328, Q. B.; Spain *v.* Cadell, 9 Dowl. 745. *Vide* Archbold's New Practice of Attorneys, Vol. 2, p. 236.

A Judge's order is obtained from his clerk, upon a written consent to the like effect, signed by the attorneys on both sides. (a) Judge's order, how obtained.

After having obtained the submission, and ascertained that the arbitrator will undertake the reference, get a written appointment from the arbitrator, and serve a copy of it on the opposite party. Make out a short statement of your case, and leave it with the arbitrator; or if the cause have been referred at Nisi Prius, leave with him one of the briefs. Then attend at the time appointed, with your witnesses, and have them called in before the arbitrator, in the order in which you wish them to be examined. Proceedings before the arbitrator.

If statements, as above mentioned, or the briefs, have been delivered to the arbitrator, it is not usual or necessary for even counsel to address him in the first instance, but he at once proceeds to hear the witnesses on both sides; and he then hears the parties by their counsel or attorneys,—for the plaintiff first, then for the defendant, and lastly (if the defendant have called witnesses or given other evidence), for the plaintiff in reply.

Some arbitrators, in cases where the defendant has given evidence, allow the counsel or attorney for the defendant to address him first, and then the plaintiff's counsel or attorney in reply. But in this, and in all other matters under the immediate control of the arbitrator, it is impossible to lay down any general rule of practice, each arbitrator usually adopting such a line of practice in this respect as he thinks best (b).

The form of oath to be administered, may be thus: "You shall true answers make to all such questions as shall be Form of oath.

(a) *Vide Archbold's New Practice of Attorneys*, Vol. 2, p. 237.

(b) *Ibid.* 241.

asked of you, touching the matters in question between the parties to this reference; So help you God."

Form of
affirmation.

Or in the case of a Quaker or Moravian, he may make an affirmation thus, repeating it after the arbitrator: "I, A. B. being [one of the people called Quakers," or "one of the united brethren called Moravians,] do solemnly, sincerely and truly declare and affirm, that I shall true answers make to all such questions as shall be asked of me, touching the matters in question between the parties to this reference."

Motion for
attachment for
non-perform-
ance of an
award.

The motion for this purpose, is a motion of course. If the submission be by an order, you have merely to annex it to a motion paper; if by a bond, &c. annex to it an affidavit of its due execution, and inclose it in a motion paper: then give them to counsel to move, and afterwards draw up the rule.

In vacation, you can obtain a Judge's fiat for the rule; and upon taking it to the office, together with a motion paper signed by counsel, you may obtain the rule.

If by the award or submission you are entitled to costs, get an appointment to tax upon the rule, give notice, and proceed to the taxation, as in ordinary cases (a).

(a) It has been thought it would be a convenience for gentlemen, who may have occasion to consult this Work, to have all that was necessary placed before them, and though such questions of practical detail as are here stated, are, perhaps, beyond the province of the Work, still the Author thought the subject would be rendered more complete by the insertion of the directions above, which are extracted from Mr. Archbold's very lucid and valuable work, "*Archbold's New Practice of Attorneys.*"

REVOCATION.

Since the statute of the 3 & 4 Wm. 4, c. 42, s. 39, the parties have no power to revoke the submission to arbitration, unless by the permission of the Court, or a Judge, as is therein provided (a), but such permission cannot be obtained upon an *ex parte* statement, and in a case where a Judge at Chambers gave permission to revoke the submission, the Court rescinded the Judge's order (b). Before this statute (c) an agreement to refer might be revoked at any time before it was actually made a rule of Court.

It is necessary to notice the power of revocation as it formerly stood, because in all cases where the submission is not in accordance with the statutory enactments, it may now be

(a) Milne and Others, Assignees of Rhodes and Justamond, 7 East, 607; Brown v. Tanner, 1 C. & P. 151; Lucas v. Wilson, *supra et infra*.

(b) Clarke v. Stockin, 2 Bing. N. C. 651. Reference to arbitrator, under rule of Court, before award, the plaintiff by an *ex parte* statement induced a Judge at Chambers to revoke the submission without hearing the defendant. "The only question is, whether the order should be set aside, and on the construction of the act I think it must by the 3 & 4 Wm. 4, c. 42, s. 39, there are only two cases in which the submission is revocable, viz., by leave of the Court or of a Judge. We must construe the section *secum cum subjectam materiam*. I cannot conceive an order can be made without hearing both parties. It is clear if plaintiff had come to the Court, he could only have obtained a rule nisi in the first instance." Tindal, C. J. (653). "The fixed principles of justice requires both parties to be heard." Park, J. "The clause in section 39 is most beneficial, conducing to the administration of justice, and the saving of expense." Vaughan, J. "The authority given by the act ought not to be executed without notice to the party affected by it." Bosanquet, J.

(c) 3 & 4 Wm. 4.

Reference by
bond.

revoked, as where the submission contains no power to make it a rule of Court (*a*).

Where the reference was by bond conditioned in a penalty, the party did not by revoking the authority of the arbitrator relieve himself of the action upon the covenant (*b*), even though the authority of the arbitrator might be at any time revoked before the award was made, but it was at the risk of an action upon the bond, for the penalty, for the revocation was a breach of its condition; and which doubtless was the reason why before the late statute (*c*) so many cases are found in the books of actions upon the bond in cases of awards. It was, before the late statute, the only safe way of entering into a reference, for the agreement, even though it contained a stipulation to that effect, could not be made a rule of Court after the authority of the arbitrator had been revoked, for by the revocation, not only the authority of the arbitrator was avoided, but the agreement itself was at an end (*d*). In a case where an

(*a*) *Supra*.

(*b*) *Warburton v. Storr*, 4 B. & C. 103. Debt on an agreement to perform an award, averment of performance of agreement, but that defendant did hinder, &c. making the award, to which was a demur. Abbott, C. J. "If a party covenants to do a certain thing, and disables himself from performing it, it is a breach of the covenant. By the countermand or reversion of the power of an arbitrator, the obligee shall take the benefit of the bond, for he has broken the words of the condition, which are, that he shall stand to and abide, &c., which are inserted to prevent countermands."

Doe dem Turnbull and Others v. Brown, 5 B. & C. 384. Ejectment referred by order of *Nisi Prius* in an agreement in 1824, who was to direct in whose favor verdict, &c.; in April, 1825, lessors of plaintiff revoked the submission in August, 1825, the arbitrator directed the verdict to be entered for the defendant; rule nisi to set aside award, on the ground of being made after reversion of submission. With which the Court coincided.

(*c*) 3 & 4 Wm. 4.

(*d*) *Gibbs, C. J. King v. Joseph*, 5 T. R. 452.

action had been commenced which was afterwards referred, and on the very day the award should have been made, the plaintiff served the arbitrator with a deed of revocation, and proceeded with the action; the defendant applied to the Court on affidavit, stating the facts: it refused to interfere to stay the action, but left him (the defendant) to plead the fact by *puis darrein continuance* (a).

Formerly, even though the reference was entered into by an order of *Nisi Prius*, it was necessary to make it a rule of Court, but now it is expressly provided in the statute of 3 & 4 Wm. 4, that such references shall not be revoked, therefore, as far as the revocation is concerned, it is unnecessary in such a case to make it a rule of Court. In cases where a party had revoked a submission containing an agreement that it might be made a rule of Court, the Court of Chancery, would not interfere by an injunction to stay the after proceedings. In a case where such an application was made, Lord Eldon, Ch., said, "Revocation cannot be without contempt, and it is sufficient to say that if you have been guilty of a contempt you cannot come here for relief" (b).

The rule which was in existence before the statute of the

Submissions
containing no
power to make
same a rule of
Court.

(a) *Lowes v. Kermode*, 8 Taunt. 146.

(b) *Harcourt v. Ramsbottom*, 1 J. & W. 505. The circumstances of the case were as follows:—submission was agreed to be made a rule of the Court of Chancery, the arbitrator was appointed, and new meetings held, when the plaintiff becoming alarmed, revoked by deed, a copy of which was served on the arbitrator and the defendant's solicitors, the plaintiff received no other notice of any meeting; two months afterwards an award was made.

Haggett v. Welsh, 1 Sim. 134. In this cause an order had been made by consent, referring a cause to arbitration, but no agreement as to making submission, &c.; this reference taking place under a rule of Court; the revocation of the authority of the arbitrator is a high contempt, and when proper application is made, will be dealt with accordingly. (135). *Shadwell, V. C.*

3 & 4 Wm. 4, still applies to such submissions as are entered into by agreement or deed, or otherwise, which contain no agreement that it shall be made a rule of Court, for at Common Law agreements to refer were revocable at any time (before an award was made), therefore it is only by the force of the statutory enactments that the Courts can compel the parties to perform them, and so they remain at this hour, and no Court can interfere to prevent a revocation of a submission if the agreement does not contain a clause enabling the parties to make it a rule of Court; therefore, now, when a submission is revoked, which is entered into in accordance with the statutory regulations, the revocation is occasioned not by the will of either of the parties, but by a matter extrinsic of the will of the parties, as the death of one of the parties, (where the submission does not provide for the executor being made a party, or the matter of the award surviving to him), or by the death of the arbitrator (a); so

(a) *Harper and Another, Assignees v. Abrahams*, 4 Moore, 3. Cause was referred; arbitrator died; it was agreed his partner should be arbitrator in his stead, before he acted the defendant's attorney gave him notice not to act (verdict was taken for 3000*l.* subject), application was made to the Court that the *postea* might be delivered to plaintiff. Held, the Court had no power to make such a direction, though the revocation was contrary to good faith; the death of the arbitrator, without making his award, has the effect of opening the cause.

Cheslym v. Dalby, 2 Y. & C. 1. A. agreed with B. in consideration of a certain sum paid by C., that he would execute a mortgage on his real estate for such sum, and also for what money might be due to B., from the year (fifty years back), to be included in the mortgage, (B. being an attorney). The question was, whether the mortgage might not be discharged by payment of such a sum as was due within six years previously to the agreement, under the plea of the Statute of Limitations; the arbitration originally agreed to being frustrated by the death of the arbitrator: the question is, can the Court decree a specific performance of the agreement in the deed of trust by compelling plaintiff to name a fresh arbitrator, or in case of his refusal, refer

also by the marriage of one of the parties, after a submission to award (a).

It is now usual to insert into the submission a provision, Provision that matter of submission shall survive. that the matters submitted shall survive to the executor, and when such a power is contained therein, death does not work a revocation; but where the submission contains no such power, the submission is thereby revoked. Mr. Wat-

the case to the Master, the special mode having failed; on taking the account the Master to allow the defendant the benefit of the Statute of Limitations, and all other defences which could have been legally made by him when the deed of trust was executed. "It seems to me this is an absolute agreement, that the estate should be bought for the true valuation, with the conditional waiver of the defence of the Statute of Limitations in the event of the amount being ascertained by the selected Judges." (198). Alderson, B. The Master was directed to find the amount due within the six years, the plaintiff to prove payment, and the defendant to be enabled to set up the deed, in answer to the statute, with a view to the future decision of the question.

(a) *M'Cave v. O'Ferrall*, 8 Clark & Fin. 30; *Charnley v. Winstanley and his Wife*, 5 East, 266. Declaration in covenant of a deed against Frances (a married woman's then name), setting out a reference; condition awarded to be made during their natural lives, plaintiff stated performance on his part, and averred that defendant, Frances, before her marriage, did not, &c., and that defendants had not, after their intermarriage, &c., performed, &c., and that after matrimony, &c., and intermarriage of defendants, and during joint lives, &c., that such arbitrator made his award, and alleged as breach defendant did pay the sum awarded. Plea *non est factum*. After verdict for the plaintiff it was moved in arrest of judgment, that the marriage of Frances, after entering into the covenant, and before award, was a revocation of the arbitrator's authority. "A marriage before an award made is *primâ facie* a breach of the covenant to abide the award." (268). Lord Ellenborough. "The statement in the declaration is a sufficient allegation of the marriage before the award, which constitutes a breach of the covenant." (Lord Ellenborough. (269). Plaintiff could not recover as for a breach for non-performance of an award; and as by her marriage, B., by her own act had put it out of her own power to perform the award, the covenant to abide the award was broken.

Death of one
of several parties.

son says (a), "It appears to be questionable, whether or not the death of one of several parties, on the same side, to a joint and several submission, is a revocation as to the others," with which Tindal, C. J., agreed (b), and said, "We therefore think that we should not be justified in setting aside the award upon motion upon this objection. If, on moving to enforce it by attachment, it could be made to appear to us, that the party called upon to perform the award incurred any danger, or lost any benefit by reason of the personal representative of the deceased partner not having been brought before the arbitrator, in such case, terms and conditions might be imposed, calculated to remove such danger and inconvenience, or the party might be left to his remedy upon the award" (c). As a general

(a) Watson on Awards.

(b) *In re Hare, Milne, and Haswell, supra.*

(c) *Wrighton v. Bywater and Others*, 3 M. & W. 199. Reference by order of Nisi Prius, of all matters in difference at law or in equity, and to order, &c., award to be in writing, &c. &c., or if either be dead, to their respective personal representatives, who should require the same on or before, &c.; costs of cause to abide reference; power to enlarge time; arbitrator to be at liberty to make one or more awards at his discretion. At this time two suits in equity were pending, in which the parties in the cause and certain infants were interested, and other matters. On the first meeting the defendant's counsel being absent, a postponement was applied for; as a condition the arbitrator required 730*l.* to be lodged at a bankers, to abide the event of the award, which was done. Time was extended to the first day of Michaelmas Term, 1836; meanwhile A., a plaintiff in one of the equity suits, died on the 27th of December, 1835. The award was, that the defendant should pay 500*l.* to the plaintiff, and a further sum of 350*l.*, awarded to be paid by the defendants as damages for grievances, not included in plaintiff's declaration, provision was also made for the costs of the cause of the reference and the award. Rule was obtained to set aside award, on the ground of its not being final, as not having disposed of suits in equity; that infant parties were not bound by submission; that it was revoked by the death of A.; and that the award of 350*l.* for other grievances

proposition, it may be said, that the death of one of the parties, at any time before the award is made, acts as a revocation of the submission, and thereby the power of the arbitrator is determined (a). Where all matters referred can be embraced in a verdict taken at Nisi Prius, in such case, the death of either of the parties, before the arbitrator has made his award, will not act as a revocation of the submission (b); but where it will not embrace all matters, as where the arbitrator has to direct something to be done concerning certain of the matters submitted, in such case, the death of one of the parties is a revocation (c). If a

Death a revocation.

Death when a revocation.

When not a revocation.

was not sufficiently certain. (301). We are of opinion, that under the circumstances of the case, the award is good.

As to the death of A., if the award upon that suit be not essential to the validity of the award on other matters, it may nevertheless be good. So if determination of those matters in which infants have an interest, be not necessary to the decision of those in which they have none, the want of such decision would be immaterial.

(a) *Cooper v. Johnson*, 2 B. & A. 394; *Potts v. Ward*, 1 Marsh. 366; *Bristow v. Binns*, 3 Dowl. & Ry. 184; *Toissant v. Harlop*, 7 Taunt. 571.

(b) *Bower v. Turner*, cited in *Rhodes v. Haigh*.

(c) *Rhodes v. Haigh and Another*, 2 B. & C. 345. Right to a water-course; verdict was taken subject to a reference, and of all matters in difference; plaintiff died on the 5th of December, and the award was not made until the 6th of February following; rule nisi to set aside, on the ground that the death of the plaintiff before the award was made was a revocation. "The death of any of the parties is in general a revocation of the arbitrator's power, but when the submission is by order of Nisi Prius, and a verdict is taken, which arbitrator is to alter as he thinks fit, if nothing else is submitted which the verdict and judgment will not embrace, the death will be no revocation. (346), in *Bower and Turner* (E. T. 1816). Tayler died before the award was made; the arbitrator ordered the verdict to be entered in both cases, and plaintiff to pay costs of reference, a rule nisi was obtained, and it was urged the plaintiff might have wanted to examine Tayler. Abbott, J., observed, that upon affidavits that he so intended, it might furnish a special ground for vacating the award, but the Master having stated that costs of reference would be included in the judgment, his

Remedy by executor against a stranger.

Clause stipulating for the survival of the submission.

stranger to a cause becomes a party to the submission, by a rule of Court, before any jury is sworn, and one of the parties die, if the award is against the stranger to the cause, the executor of the successful party shall have his remedy against him (*a*), for the suit only abates by the death of a party. Where the submission contains a power in event of death, &c., in such case, death is no vacation of the submission (*b*), and the executors of the party will be bound by the award of the arbitrator made after the death (*c*). This clause was introduced into the orders of *Nisi Prius*, and submissions generally, solely for the purpose of obviating the inconvenience death occasioned (*d*). If the arbitrator enlarges the time, after the death of the

Lordship held that death did not prevent the arbitrators' proceeding. Bayley, J. "The case falls within the principles of Bower and Turner, for all matters in difference are referred, and the arbitrator has power to regulate the future enjoyment of the stream. The verdict and judgment would not embrace either. Award set aside." Abbott, C. J.

(*a*) *Rogers v. Stanton*, 7 Bos. & Pul. 576, Gibbs, C. J., *vide supra*.

(*b*) *McDougal v. Robertson and Another*, 4 Bing. 435, in error. Question is, whether an award is invalid, because some of the proceedings were had, and the award was made after the death of one of the submitting parties, a clause was inserted in the submission for the matter to survive in event of the death of either of the parties, the Court decided award was good. Alexander, C. B.

(*c*) *Dowse v. Cox*; *Biddle v. Dowse*, *supra*.

(*d*) *Clarke v. Crofts*, 4 Bing. 143. Verdict by consent, subject to award by order of *Nisi Prius*, all matters in difference; award to be delivered to the parties or their personal representatives; power to enlarge time, plaintiff died; award in favour of plaintiff; general rule is, death is a revocation, but there are many instances wherein parties may renounce an advantage cast upon them by a general rule of law. Here is an implied understanding in the parties to bind their personal representatives to the fulfilment of the award, and there is no law to prevent a man from so binding himself and his representatives. Best, C. J. (146). "The clause for the declaring of an award to the executors was introduced into the orders of *Nisi Prius*, solely for the purpose of abolishing the inconvenience that death occasions." Parke, J.

party, he has power to do so, for the insertion of the condition must be taken as intending to give him the same power as though the parties had lived until the settlement of the matters before the arbitrator (a). Where the order of Nisi Prius stipulated that the arbitrator should be at liberty to examine the parties, and contained a stipulation in the event of death. Before the arbitrator had examined one of the parties, he died, and the other revoked the arbitrator's authority, on that ground, and the cause, in consequence, went down to trial again, and the verdict was in favour of him who died (plaintiff); on motion, the Court decreed the defendant to pay the costs of the first trial, the arbitration being rendered fruitless by the revocation. Tindal, C. J., said, "The rule for the examination of the parties was drawn up in the usual way, and if the defendant proposed that the condition of his consenting to the reference, should be the examination of the plaintiff, he should have stipulated for the insertion of such a condition" (b). When one of the parties die, the Court will, on application, allow judgment to be entered *nunc pro tunc* (c). Where

Clause stipulating for the survival of the submission.

(a) *Tyler v. Jones*, 3 B. & C. 144. Action for negligence at the trial, the cause was referred, and the verdict entered subject to a reference; in case of the death of either to their personal representatives; plaintiff died before award was made, and the arbitrator afterwards enlarged the time; rule to set aside award, as death was a revocation. The rule has provided in an express manner for such an event; the order of reference gave arbitrator an express power to make his award after the death of either, it is therefore evidently intended to give him the same power to enlarge the time; though the award cannot be enforced by an attachment, an action would lie against the executors upon the undertaking.

(b) *Smith v. Fielder*, 10 Bing. 308.

(c) *Lewis v. Winter*, W., W. & D. Reference by order of Nisi Prius before award was made, provision against death, if either be dead, the matter should survive to their personal representatives; defendant in whose favour award was made, died, and the application

the submission contains the clause that the matter shall survive, the Court has no power to compel the executor to go before the arbitrators, after the death of one of the parties (a).

As to the effect of the bankruptcy or insolvency of parties, in revoking submission, see under the heads *Bankruptcy* (b) and *Insolvency* (c).

was, to enter up judgment *nunc pro tunc*, which was granted; the party applying is entitled to have a verdict entered for defendant, he is also entitled to enter up judgment *nunc pro tunc*. Patteson, J. (48).

(a) *Lewin v. Holbrook*, 11 M. & W. 110. After issue joined, cause and all matters in difference were referred, reference to be made by a certain day, with power to enlarge the time by any writing under arbitrator's hand, and to examine, if he pleased, the parties to the suit, with a provision against death. Meetings from time to time were held, until defendant died; applications were made to proceed with the reference, arbitrator declined until there was a legal representative of the defendant; after several applications notice was given to the defendant's attorney, plaintiff attended by counsel, but no one appeared on the other side, the arbitrator stated he had received a notice, that in consequence of the defendant's death, the cause had abated; he thereon declined to proceed with the award, and enlarged the time for the purpose of an application to the Court. A rule was applied for, and refused, to show cause why arbitrator should not proceed with the reference. "We have no power to compel the executrix to go before the arbitrator, how can we enforce this agreement after the death of one of the parties." Lord Abinger, C. B. (112).

"If you go on with your reference, and get your award, you then have a remedy against the personal representatives, because the defendant agreed his assets should be bound thereby, but the Court has no power to direct the arbitrator to proceed." Parke, B. (112).

(b) *Supra*.

(c) *Supra*.

PLEADINGS UPON AN AWARD.

The law relating to Awards having been fully set forth in the preceding pages, it now becomes necessary to treat of the means of enforcing the performance by action upon the award, and which differ in some cases. The remedies to enforce an award (besides attachments which has been noticed) is by an action of debt on the award, which lies in all cases to recover a sum of money awarded (*a*), but if the direction be to do some collateral act or other thing, then debt on award cannot be maintained.

When it is possible it is better to proceed by action of debt than to adopt any other form of action, for in case of a judgment by default, the judgment is final in the first instance. In a case where there was a submission by bond by six partners, three against three, and the arbitrator awarded that one obligor should pay a certain sum to another obligor, it was held debt on the award was the only remedy (*b*).

Debt on bond conditioned, for the performance of an award lies when the submission is by bond, and that whether the award be to pay money, or do some other thing; and so also if the submission be revoked before the award is made, for such revocation is a breach of the condition to perform, &c., in such case the action is on the bond for the penalty (*c*). Where a submission was by agreement under seal (with mutual bonds), and the time for making the award was enlarged by consent (under seal), it was held that the action was nevertheless maintainable upon the bond, for the plaintiff's right depended upon the penal part of the bond, and that the declaration need not set out the defeasance, its effect being to limit the plaintiff's right, and

(*a*) *Watson on Awards*, 283, citing 2 Saund. 12 *a*, n. (5).

(*b*) *Winter v. White*, *supra*.

(*c*) *Warburton v. Storr*, 4 B. & C. 107, Abbott, C. J.

Debt on bond. give a defence to the action under certain circumstances and that a new defeasance would give a new defence, but would not alter the plaintiff's remedy which would still be upon the bond (*a*); in such cases the variation of the defeasance of the bond must be by deed.

Action of covenant.

Where the submission is by deed with covenants to perform the award, an action of covenant for non-performance is sustainable, and if any act is directed to be done other than to pay money, it is the only action which is maintainable, and if the submission is revoked, the covenant will lie against the person revoking the submission (*b*). In this action the judgment against the defendant is interlocutory in the first instance, but the Court will not compel the plaintiff to execute a writ of inquiry, but will refer the matter to the Master to compute what is due for principal and interest upon the award (*c*).

Action of assumpsit.

Assumpsit for the non-performance of an award will lie in all cases except where the submission is by bond, or by an agreement under seal (*d*): and where the defeasance of a bond conditioned to perform an award was varied by agreement *not* under seal, it was held the action should be debt on award, or an assumpsit upon the agreement, as debt on bond in such case would not lie (*e*).

Parties to the action, who should be.

An action on an award is a substantive cause of action, and should be brought by or against the persons parties to the submission; in a case where two persons assigned to a third all debts due to them, with a power of attorney to collect in or compound for such debts, on the assignee submitting to arbitration the matter of one of such debts, it was held the assignee might sue, upon the award, and that in

(*a*) Greig v. Talbot, 2 B. & C. 188, Best, J. *Vide* Hodges v. Smith, Cro. Eliz. 623, and Evans v. Thompson, 5 East, 189.

(*b*) Marsh v. Bulteel, 1 Dowl. & Ry. 106.

(*c*) Watson upon Awards, citing Tidd's Practice, 570, 9th edition.

(*d*) Parsloe v. Bailey, 2 Ld. Raym. 1040; 2 Saund. 62 a, n. (5).

(*e*) Greig v. Talbot, *supra*. Watson on Awards, 285.

such a case the Court would not presume the matter in difference arose after the assignment and power of attorney, for if such was the case the defendant should have pleaded it (*a*); and where several submit, and jointly and severally promise to abide by the award, by such promise they are jointly as well as severally responsible for the matter awarded, and all or either may be sued for the whole of the sum awarded (*b*); but where the matter of an award is assigned before the award is made, on the award being made the assignee cannot sue in his own name, but must in the name of the assignor for the matter awarded, for it was but the assignment of a chose in action.

Parties to the action, who should be.

In action of debt on award, it is not necessary by way of inducement to state the particular matters which were in difference between the parties, a general allegation that differences, &c. existed being sufficient, but it must be stated that the parties mutually submitted; an award being a determination by a third person between others who submit to his judgment, the submission creates a mutual obligation upon them to acquiesce in his decision (*c*). Generally it is sufficient to allege the plaintiff and the defendant submitted themselves to the award of A., without setting out the submission, or saying it was in writing. But if the parties by their submission are bound in a manner different from what they would in general be subject to, then the particular terms of the submission must be stated, in order to show their liability, as in the case of *Mansell v. Burrige* (*d*), where two tenants submitted certain dilapidations to arbitrament, and bound themselves jointly and severally to perform the award, in a declaration against one of them for the whole sum awarded, it would be necessary to set forth the submission to show the liability. So in the

Debt on award, allegations in.

Agreement, &c., jointly and severally to perform the award.

(*a*) *E. P. Banfit and another v. Leigh and Jeffray*, 8 T. R. 571.

(*b*) *Maunsel v. Burrige*, 7 T. R. 352. *Geune v. Tinkler*, 3 Lev. 24.

(*c*) 2 Saund. Rep. 61, n. (2), citing *Dilley v. Polhill*, 2 Str. 923.

(*d*) *Supra*.

case of *Geune v. Tinker* (a), where three persons were severally bound to observe, &c. the award, and it was awarded that each should pay 20*s.*, held it was no fulfilment of the award by one that he had tendered 20*s.* awarded as against him, for he was jointly and severally bound.

Mutual submission, allegation of.

In this action the plaintiff must allege a mutual submission, and prove his own execution thereof, and also that of every person who was a party thereto, for the defendant might not have consented to refer unless the others had joined (b). So the award or umpirage should be stated to be made in pursuance of the submission in form as well as in substance. Where the submission was so that the award be made in writing under hands and seals, &c., it need not be averred that it was made in writing, for if it be under hands and seals, writing would be necessarily intended (c); an averment that the award was in writing without stating it was under hands and seals, is insufficient, and bad upon general demurrer (d).

Award to be made in writing.

Notice of award.

It is usual, though unnecessary, to aver that the plaintiff had notice of the award, for it is a general rule that of matters which do not lie more in the knowledge of one than the other of the parties, notice is not requisite (e), but if it be provided that the award should be notified to the parties, it is then no award unless such notice is given (f).

Award not a specialty.

An award, though indented and under hand and seal, is no deed nor specialty, but a writing under hand and seal (g), it is not necessary to make profert thereof.

(a) 3 Lev. 24.

(b) *Ferrer and A. Rollason v. Oven*, 7 B. & C. 430. *Dilley v. Polhill*, *supra*. *Maunsell v. Burridge*, 7 T. R. 352.

(c) *Ruesby v. Manning*, 2 Car. 159, citing *Lane v. Butter*, 2 Sid. 38.

(d) 2 Saund. Rep. 62, n. (3).

(e) *Gable v. Moss*, 1 Buls. 44.

(f) *Child v. Horden*, 2 Buls. 142. *Rex v. Holland*, 5 East, 624, *per* Lord Kenyon.

(g) *Dod v. Herbert*, Sty. 459. *Perry v. Nicholson*, 1 Burr. 281. Doc. Pla. Arb. 88.

It is unnecessary to show in the declaration more of the award than is sufficient to sustain the action, so a declaration that amongst other things it was awarded, is good (*a*). So if the declaration shows an award of something to one without directing any thing to be done by the other, it is sufficient (*b*); for if there be any thing to be done by way of condition precedent, the defendant can set it out and demur; but though the plaintiff need only set out so much of the award as supports his case, it must be set forth according to the substance and legal effect of the award, or there will be a variance. The better mode is to use the language of the award.

Setting out
award in the
declaration.

Where a time and place is fixed in the submission for the delivery of the award, it must be shown that the award is in those particulars a compliance with the submission (*c*). But if the submission, as is now usually the case, provides "so as such award be made and set down in writing ready, &c.," it is sufficient to allege that the arbitrator made his award without stating that it was ready to be delivered, for when the award is published (that is executed), it is ready to be delivered (*d*).

Delivery of
award.

Where money is awarded to be paid at a particular time and place, it is not necessary to state the attendance of the plaintiff, or a demand of payment by the plaintiff there (*e*),

Money to be
paid at a par-
ticular time or
place.

(*a*) *Foreland v. Marygold*, 1 Salk. 73. Doc. Pla. Arb. p. 88.

(*b*) *Smith and Kerfoot's Case*, 1 Leon. 72. *Tilford v. French*, 1 Sid. 161. Doc. Pla. Arb. 87.

(*c*) *Bussfield v. Bussfield*, Cro. Jac. 577. Doc. Pla. Arb. p. 88. *Rousby v. Manning*, 3 Mod. 331.

(*d*) *Brooke v. Mitchell*, 6 M. & W. 473.

(*e*) *Rowe v. Young*, 2 Brod. & Bing. 233,—*Bayley, J.* "An award directs money to be paid at a particular time and place. In an action on the award, does the declaration allege any demand at that time or place?—certainly not. In an assumpsit upon an award, the declaration would be, that the defendant promised to perform the award, and that the award directed payment at a given time or place; in substance, therefore, (incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the defendant's, at a given time or place, and yet the declaration never states either attend-

but where money is awarded to be paid at a particular time or place upon a collateral thing being done by the plaintiff as to indemnify, or the like, it must be alleged that the plaintiff was ready at the place to perform his part of the award (*a*).

Day, on which
award made.

The day on which an award is made may be laid under a *videlicet*, for the Court will presume that the day so laid was the day upon which the award was made (*b*).

Not assigning
a breach,
effect.

The declaration must assign a breach; for the want of assigning a breach is a matter of substance and bad upon general demurrer (*c*). So, if a bad breach be assigned, it is not aided after verdict (*d*). If an award be in the alternative, the non-performance by the defendant as to each part of the alternative must be averred (*e*). In assigning the breach it is sufficient to say, "that the defendant did not pay according to the tenor and effect of the award;" it was objected that it was not alleged that on or before the day mentioned in the condition of the bond, that the defendant did not pay the money awarded to be paid. *Powell, J.*, said "it would have been the neatest way, but that it was well enough. The rule," he observes, "was, that where the day of payment or performance appears before upon the record there, in averring performance, or assigning a breach for the want of it, the day need not be mentioned certainly, but may be referred by a *præd* to the record, since *id certum est quod referendo fit certum est*; but if the award had been for the payment of money, &c., at one or more days, in a certain indenture mentioned, then to assign a breach for

ance by the plaintiff at the place, or a demand by the plaintiff at the place; the utmost it states, is, that the defendant did not pay at the time or place, or at any other time or place."

(*a*) *Phillips v. Knightley*, Fitg. 53. Doc. Pla. Arb. 88.

(*b*) *Skinner v. Andrews*, 1 Saund. Rep. 169; *vide Cutler v. Southern*, 1 Saund. 116.

(*c*) *Heard v. Baskerville*, Hob. 233. *Brickhead v. Archbishop of York*, *ibid*, 198.

(*d*) Com. Dig. tit. "Pleadings," (F.) 14. Yelv. 153.

(*e*) Caldwell on Awards, 207.

non-payment, or to allege payment at the day, &c., in the said indenture mentioned would be ill; the way, in such a case, would be to set forth the indenture, so that the day might appear upon record, and then refer to it (a). In a case in *Ventnor* (b) it is said, where money is awarded to be paid in pursuance of a will or indenture, it is sufficient to refer generally to the instrument; but in an award, if payment be directed to be made at certain times, or in a certain manner, specified in a particular deed, then those parts of the deed must be specially set out. The plaintiff is not confined to assign one breach only: on every breach assigned and proved damages may be assessed; but when entire damages have been given, and a breach has been assigned on a part of the award which is void, judgment will be arrested (c).

Not assigning
a breach,
effect.

A request need not be specially averred, unless the money is awarded to be paid upon request, then a special request must be averred (d).

Request,
avermont of.

Since the new rules, 4 Wm. 4, to debt on award, the defendant cannot plead never indebted, in manner and form, &c.; for it is not an action of debt upon a simple contract, and, at all events, it would only put in issue the submission (e). So it is necessary to set forth specially any matter of defence; unless the award, as set forth in the declaration is bad, the course then is to demur; if all matters submitted are not decided, or the award is uncertain, or not final, it must be specially averred (f). So, if money be tendered as a set off.

Where a defendant conceives the award to be void, he may plead *nul agard*, and then demur to the replication which sets out the award (g).

Nul agard,
plea of.

(a) *Lee v. Elkins*, 12 Mod. 533.

(b) *Anon.* 1 Vent. 87.

(c) *Bedell v. Moore*, 4 Leon. 179; *vide Yelv.* 35.

(d) 1 Saund. 32, *Bicks v. Trippet*.

(e) *Watson on Awards*, 292.

(f) *Cargay v. Aitcheson*, *supra*.

(g) *Com. Dig.* tit. "Arbitration," (1. 4,) *Fisher v. Pimbley*, *supra*.

Where the defendant pleads that a matter submitted to the arbitrator has not been decided (*a*), the plaintiff may traverse the allegation, and thereby call upon the defendant to prove the truth of his plea (*b*). Where a release has been awarded to the time of the award, and differences have arisen after the submission, a special plea to that effect would be a good plea in bar to an action upon the award (*c*).

Release, award of.

Money awarded attached in London.

In a case where money was awarded, and which was attached by a process from the city Courts, it was held such attachment would have been a good plea to an action of debt on the award, but not to a debt upon bond, because by failure of performance of the award the penalty accrues due (*d*).

Revocation.

To an action of debt on award, revocation is a good plea, but not to debt on bond, or action of covenant (*e*).

Nul award repudiated.

When the action is on the award, and the plea is that no such award was made, if there was an award, the plaintiff should reply the fact, for the production of the award in evidence would support the replication (*f*).

To plea of *nul award*, the plaintiff must reply by setting out the award and breaches *verbatim*, or the variance would be fatal (*g*); but where the award is void in part only, the void part need not be set out (*h*).

Debt on bond, conditioned to perform the award.

In debt on bond, conditioned to perform an award, the usual course is to declare upon the bond, without setting out the conditions or assigning breaches (*i*); but if the plaintiff thinks proper he may set out the condition, and assign the

(a) *Mitchell v. Staveley*, *infra*.

(b) *Ravee v. Farmer*, 4 T. R. 146.

(c) *Alabaster v. Olifford*, Rols. Abr. (B.) 23.

(d) *Ingram v. Bernard*, Lord Raymond, 636, *sed vide supra*.

(e) *Marsh v. Bulteel*, 5 B. & A. 507. *King v. Joseph*, 5 Taunt. 452.

(f) Com. Dig. tit "Pleadings," (E. 32.)

(g) Com. Dig. tit. "Arbitration," (I. 5.) *Forland v. Marygold*, Salk. 72.

(h) *Vide infra*, "Pleas to Debt on Bond," "Conditions to perform Award."

(i) *Gainsford v. Griffiths*, 1 Saund. 58, n. (1); 2 Saund. 187, n. (2)

breach in the declaration, which is the most prudent course, as it avoids the difficulty of suggesting them upon the roll.

The plea of *non est factum* only puts in issue the bond of submission, (*i. e.*) the sealing and the delivery. Non est factum.

Nul agard denies that an award has been made, if an award has been made, but which is void, the plea of *nul agard* has application thereto: it was formerly held, that the plea of no award meant no award in fact; but since *Fisher v. Pimbley* (*a*), it has been held to apply to no award in law, (*i. e.*) to an award which is bad upon the face of it; it is now a departure from the plea to set out in the rejoinder an award which is defective. Nul agard.

If the award be bad for matter extrinsic, (*i. e.*) not apparent upon the face of it, as where there were matters in difference, of which the arbitrator had notice, but did not award thereon, such matter should be specially pleaded (*b*). So, also, where an award may be final, or not, Award bad for matter extrinsic.

(*a*) *Fisher v. Pimbley*, 11 East, 188.—Debt on bond, conditioned, &c., (*decided upon demurrer.*) Defendant pleaded *nul agard*, replication partly setting out award, rejoinder setting out the whole of the award, —to which there was a demurrer, alleging for special cause, that the rejoinder was a departure from the plea, and neither confessed, avoided, or denied the matters pleaded in the replication. *Scarlett*, —Plea of no award, means, no award in fact, citing *Farrer v. Gate*, Palm. 511; *Skinner v. Andrews*, 1 Lev. 243; *House v. Lauder*, *ib.* 85; *Harding v. Holmes*, 1 Wils. 122; and *Praed v. The Duchess of Cumberland*, 4 T. R. 585. The rejoinder should have been, no such award as set out in the declaration. “The award is bad, and had the plaintiff set it out truly in his declaration, defendant might have demurred: where is the inconsistency or departure, in the defendant doing that which the plaintiff should have done?—He thereby still maintains his former allegation, that there was no award; in other words, that there was no legal and valid award under the submission, which is the same as no award.”—Lord *Ellenborough*, C. J., with which *Le Blanc*, J., and *Bayley*, J., agreed; *et vide* *Gisborne v. Hart*, 5 M. & W. 58.

(*b*) *Cargy v. Aitcheson*, 2 B. & C.—In this case, the defendant set out the submission and the award, to which the defendant demurred. “The plaintiff will be entitled to recover upon that part of the award whereon a breach is assigned, unless the Court can see it is bad. It is alleged to be contrary to the submission, and not final;

Award bad for
matter ex-
trinsic.

according to extrinsic facts, and the objection is for uncertainty, the fact should be specially pleaded (*a*). So where an award was made on the day named, but unstamped, for which reason the arbitrators refused, on request, to deliver it, such matter should be specially pleaded (*b*); because, if the plea had been *nul agard*, it would have been defeated by the production of the award, for it is published when executed, the stamp not being a matter necessary to its valid publication; the refusal to deliver was a non-compliance with the condition of the bond, and for which reason it was necessary to be specially pleaded.

Performance,
plea of.

In a plea of performance, first, oyer of the condition of the bond is craved, and then the award is set out without recitals: when performance is pleaded, it must be done in the terms of the award, and it is sufficient to allege performance of that part of the award which is good. If part be bad,—if an award is only partially performed, it should be so pleaded; for if performance was pleaded, and then in the rejoinder a special performance was pleaded, it would be a departure (*c*). If the defendant shows an award, and pleads performance of it only, issue may be taken upon it, and in such case it is unnecessary to assign a breach (*d*).

the objection must be made to appear by something upon the face of the declaration, and wherein any fresh facts might have been stated, which would have helped to support the objection, is not a question before the Court, we can only look to the pleadings. It has been observed, the agreement referred to (submission) should have been shown; but the defendant might have pleaded, that if there was any thing in it to vitiate the award, in the absence of such a plea, we cannot presume any thing against the award.”—*Bayley, J.* (175.) “Upon a demurrer to the declaration, the objections are not established, if that could have been done by extrinsic evidence, it should have been pleaded.”—*Holroyd, J.* (176.)

(*a*) *Vide supra*.

(*b*) *Wilson v. Wilson*, 1 Saund. 327, (*c*), *in notis.* *Rowsby v. Manning*, 3 Mod. 330.

(*c*) *Watson on Awards*, 299.

(*d*) *Semble, Veal v. Warner*, 1 Saund. 326. *Lindsay v. Ashton*, 1 Rol. Rep. 6.

An excuse from performance must be specially pleaded, as in the case of *Hanson v. Boothman and others* (a), decided upon demurrer, wherein the defendants pleaded they had made the proper attempts to get the coal, but that they had been unsuccessful; Lord *Ellenborough* said, such a plea was no answer to past breaches, but that it was to future breaches, and if it at the trial was proved proper efforts had been made, but that it was impossible to get the coal, no person was bound to do impossibilities, with which proposition the other judges agreed, and *Bayley, J.*, suggested, that the plaintiff had better take issue upon the sufficiency of the experiments; leave to amend was given accordingly. So if the defendant had tendered performance, and has always been ready to perform, (for a request after a tender and non-performance over-sets the former tender), or if the plaintiff had hindered the defendant from performing the award, such defences should be pleaded according to the fact (b). On an award that a suit should cease, it was held sufficient to aver, that the defendant did not prosecute the suit, and that the party had not been molested, without showing an actual discharge (c). So non-performance of a condition precedent is a good plea (d) that the defendant was and still is ready and willing to perform his part of the award, when the plaintiff has put him in a condition to do so, by the performance of his part (e).

Performance,
plea of.

Corruption or misconduct of an arbitrator, or waiver by parol agreements, are not good pleas (f).

Corruption or
misconduct.

In a case where the defendant revoked the submission, on account of an insufficient time being allowed for the examination of his witnesses, on an action being brought

Revocation.

(a) 13 East, 22.

(b) Caldwell on Awards, 212.

(c) Com. Dig. tit. "Arbitration," (14). *Freeman v. Shene*, Cro. Jac. 339.

(d) Watson on Awards, p. 300, citing 1 Chitty on Pleadings, 309.

(e) Com. Dig. tit. "Accord," (D 2)

(f) *Thompson v. Baddick*, *supra*.

Revocation. upon the bond, the defendant pleaded, that the arbitrator refused to allow him sufficient time to produce his witnesses, and that he, therefore, by deed, revoked the submission, the plea, on demurrer, was held insufficient. *Bayley, J.*, said, the plaintiff had done no act to prevent the arbitrator from making his award, but that the defendant, by revoking the submission had, and that the plea was bad in form, for it was insufficient for the defendant to say, that he was ready to bring forward his witnesses; he ought to have alleged that he had them there (*a*). A plea of revocation to an action on the submission bond is bad, for such a plea must state a breach of the condition. The revocation of the arbitrator's authority is a breach of the condition, and is a forfeiture of the bond.

Debt on bond, and debt on award, difference between. The action of debt on bond, conditioned to perform the award, has this advantage over a simple action of debt on award; for in the latter form of action, the onus of proof of the submission is upon the plaintiff, whilst in the former it is thrown upon the defendant.

Judgment by default, in action of debt on bond. In debt on bond conditioned to perform the award, whether the defendant lets judgment go by default, or pleads, the plaintiff must assign or suggest breaches of the condition, and though the defendant has pleaded *non est factum*, suggestion must be entered on the roll, under the stat. 8 & 9 Wm. 3, c. 11, s. 8 (*b*).

Assigning breaches in the replication. In the replication it is necessary to set the whole of the award, unless the defendant has set it out in his plea, but if only a part be there set out, the whole must be set out in the replication (*c*); care should be taken by the plaintiff in assigning his breaches, that he does so on that part of the award which is good, for we have seen that an award may be good in part, and rejected as to the rest, and if a breach be assigned in that part which is ill, the plaintiff

(*a*) *Grazebrook v. Davis*, 5 B. & C. 538.

(*b*) 2 Saund. 187 n. (2); 1 Saund. 58, n. (*b*).

(*c*) *Foreland v. Marygold*, *supra*.

must fail (a). Since the case of *Fisher v. Pimbley* (b), a rejoinder when *nul agard* has been pleaded. replication to a plea of *nul agard* should conclude with a verification, though it was formerly thought it should conclude to the country, for it was held *nul agard* meant no award in fact (c.) When the breach of the condition of the bond is by the revocation of the arbitrator's authority, it is sufficient to state that the defendant by a deed, &c. revoked and abrogated the arbitrator's authority, without saying the arbitrator had notice thereof (d). When an award is in the alternative, the defendant must state with which he has complied (e). It is a departure if the defendant pleads a general performance in bar, and then shows a special performance in rejoinder (f). In a case where the defendant pleads he did not submit, the plaintiff need only join issue, for unless there was a submission there could be no award (g), but since the statute 8 & 9 Wm. & Mary, a breach must be suggested upon the roll (h).

In an action of covenant on the submission, the declaration states the submission, the award and the breach: in this action the same pleas may be pleaded as in the action for debt on bond conditioned to perform an award. Covenant on agreement.

In assumpsit on a submission to arbitration, the breach must be substantially stated, as in debt on bond, &c., merely varying the form of action, and all matters in confession and avoidance of whatever nature must be specially pleaded, for the plea of non-assumpsit merely puts in issue the making the submission (i). Assumpsit.

(a) Addison v. Gray, 2 Wils. 293. Fox v. Smith, *ib.* 267.

(b) *Supra*.

(c) 1 Saund. 327, n. (1).

(d) Marsh v. Bulteel, 5 B. & C. 507.

(e) Vin. Arbitration, F. a. 4.

(f) Rosse v. Hodges, *Ld. Raym.* 234.

(g) Com. Dig. tit. "Pleadings," (F) 15.

(h) Welsh v. Ireland, 6 East's Rep. 613.

(i) Reg. Gen., Hilary Term, Wm. 4.

FORMS.

THE Author has appended a few pleadings upon awards, as forms, and has deemed it unnecessary to increase the bulk of the work by repeating forms which may be found in the various cases cited throughout the work.

DECLARATION in Debt upon an Award wherein an Action was referred, a Rule of Court.

In the Queen's Bench.

THE day of , in the year of our Lord 18 ,
Lancaster, to wit. A. B. (the plaintiff in this suit), by E. T., his
attorney, complains of C. D. (the defendant in this suit), who has
been summoned to answer the said plaintiff in an action of debt.
And he demands of the said defendant the sum of £ , which
he owes to and unjustly detains from him. For that whereas
heretofore, to wit, on the day of , a certain
cause was pending and undetermined in her Majesty's Court
of Common Pleas at Lancaster, wherein the plaintiff and the
defendant were respectively also the plaintiff and the defendant,
and thereupon to wit, on the same day and year as aforesaid, by a
rule or order of the said Court, upon hearing the attornies or agents
on both sides, and by their consent it was ordered, that the said
cause, &c. (*set out the Judge's order referring the cause with the con-*
ditions), as by such rule or order reference will fully appear, and
the plaintiff saith that afterwards and before the day of
aforesaid, to wit, on the day of May (*date of award*),
in the year of our Lord 18 aforesaid, the said arbitrator took upon
himself the said arbitration and reference, and then also duly made
and published his award in writing of and concerning the said pre-
mises so referred to him, ready to be delivered to the said parties,
or either of them requiring the same, and did thereby award, and
find, and adjudge, &c. &c. (*set out the award*), as by the said award
reference being thereunto had, will appear; and the plaintiff further
saith that afterwards, to wit, on the same day and year aforesaid, the
costs of the said action, and also the costs of the said reference and
award, were duly taxed by the proper officer of the said Court, and
amounted, when so taxed, to a large sum of money, that is to say,
of £ , whereof the defendant then had notice, yet the
defendant did not, nor would on or before the said (*day on which*
payment is directed to be made), at the office, &c., or at any other

time or place whatsoever, pay the plaintiff the said sum of (*sum awarded*), in the said award mentioned, or any part thereof, or the said sum of (*taxed costs*), the costs as aforesaid, or any part thereof, but wholly refused so to do, and the same and every part thereof is still due and unpaid, to the plaintiff's damage of £ , and therefore he brings his suit, &c.

DECLARATION on Debt referred at the Assizes, when a Juror was withdrawn.

Commence as above.—For that whereas at the assizes held at , in and for the county of , aforesaid, on the day of a certain cause then depending between the plaintiff and the defendant (*whenever the said parties respectively were plaintiffs or defendants*), was then and there to have been tried between them, and whereas by an order made at the said assizes so held at aforesaid, in and for the county aforesaid, on the day of , in the said cause. It was ordered by the Court, by and with the consent of the said parties, their counsel and attornies, that one of the jurors empaneled and sworn to determine the issue between the said parties in the said cause, should be withdrawn, and that all matters in difference between the said parties in the cause (*if all differences between the parties are submitted, or if only the cause in the cause between the said parties*), should be referred to the award of (*set out the order of reference*), then proceed as above.

ACTION of Debt on Award, where the Cause, &c. was referred by a Judge's Order.

For that whereas divers disputes and differences have arisen, and were depending between the plaintiff and the defendant, the plaintiff, heretofore, to wit, on the day of , in the year of our Lord, 18 , commenced an action at law in her Majesty's Court of Queen's Bench against the defendant for the recovery of a certain sum of money alleged to be due from the said defendant to the said plaintiff. And thereupon heretofore, to wit, on the day of , in the year of our Lord, 18 , by an order of the Honorable Mr. Justice Patteson, then being one of the justices of the said Court of Queen's Bench, made in the said action, dated the day of , it was amongst other things ordered upon hearing, and with the consent of the attornies of the said parties in the said cause that all matters in difference between the said parties thereto (*as the fact may be*), should be referred to the award and determination of &c. (*Set out the order and proceed as above*).

DECLARATION in an Action of Assumpsit upon a Submission to Arbitration.

In the Queen's Bench.

THE day of , in the year of, &c.
London, to wit. A. B. (the plaintiff in this suit), by E. T., his attorney, complains of C. D. (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of promises. For that whereas certain differences and disputes had arisen, and were depending between the said plaintiff and the said defendant, and thereupon afterwards, to wit, on the day of , 18 , an order to the final ending, adjustment, and determination of the said differences and disputes then depending between the said plaintiff and defendant, the plaintiff and the defendant did by an agreement in writing mutually submit themselves to stand to, abide by, perform, fulfil, and keep the award and determination of M. N., an arbitrator indifferently elected, chosen, and named between them the plaintiff and the defendant, to award and determine of, upon, and concerning the said disputes and differences set forth in the agreement aforesaid; and thereupon afterwards, to wit, on the day and year aforesaid, in consideration of the submission of the plaintiff, and in consideration that the plaintiff, at the special instance and request of the said C. D., had undertaken, and to the said C. D., then and there faithfully promised to perform, fulfil, and keep the award to be made by the said M. N., concerning the said disputes and differences, and of all things on his part and behalf to be performed, fulfilled, and kept, he the said C. D. undertook, and to the said A. B. then faithfully promised to perform, fulfil, and keep such award in all things on his part and behalf, to be performed, fulfilled, and kept, and the plaintiff says, that the said M. N., having taken upon himself the burden of the said award, afterwards, to wit, on the day of , in the year of our Lord, 18 , made and published his award in writing of and concerning the matters so referred to him as aforesaid, bearing date the day and year last aforesaid, and did thereby, &c. (*set out the award*). Yet the defendant not regarding his said promise and undertaking, in that behalf made as aforesaid, did not, nor hath (*paid the said money, or done other thing awarded to be done*), or any part thereof, but hath wholly neglected and refused, and doth still neglect and refuse to do, contrary to his said promise or undertaking in that behalf so made as aforesaid. To the plaintiff's damage of £ .

DECLARATION in Debt on an Award for non-payment of Money where the Submission was by Bond.

In the Queen's Bench.

The day of in the year of our Lord, 18 ,
London to wit. A. B., the plaintiff in this suit, by E. T., his attorney, complains of C. D., the defendant in this suit, who has been summoned to answer the said plaintiff in an action of debt, and he demands of the said defendant the sum of £ , which he owes to and unjustly detains from him. For that whereas, certain differences having arisen, and being depending between the said plaintiff and the said defendant, the said plaintiff heretofore, to wit, on (*date of deed*), by a certain bond bearing date heretofore, to wit, the day and year aforesaid, became bound to the said defendant in a certain penal sum in the said bond mentioned; and the defendant, by a certain other bond, bearing date, heretofore, to wit, the day and year aforesaid, became and was bound to the plaintiff in a certain penal sum in the same bond mentioned, which said bonds were respectively conditioned to (*set out the substance of the condition*); and the plaintiff further saith that the said (*arbitrator*) having taken upon himself the burden of the said arbitration, did, in due manner, and within the time for that purpose appointed, to wit, on the (*date of award*) did make and publish his award, of and concerning the said matters in difference, and did thereby (*set out the award so far as the same has relation to the non-payment of money*). Yet the said defendant, though often requested, hath not yet paid the said sum of £ , above demanded, or any part thereof, &c.

DECLARATION in Covenant on a Submission to Arbitration.

In the Queen's Bench, &c.

Middlesex to wit. A. B., the plaintiff in this suit, by J. B., his attorney, complains of C. D., the defendant in this suit, who has been summoned to answer the said plaintiff in an action of covenant. For that, whereas, by a certain indenture made heretofore, to wit, on the day of A. D. 18 , between the plaintiff of the one part, and the said defendant of the other part, and which indenture, sealed with the seal of the said defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, after reciting that divers disputes and differences, &c. (*copy the indenture reciting the disputes and submission to arbitration*) as by the said indenture recited, &c.; and the plaintiff saith that the said [*arbitrators*] having taken upon themselves the burden of the said arbitration, did, in due manner, and within the time for that purpose appointed, to wit, on the (*date of award*) did

duly make and publish their award in writing, under their hands, of and concerning the said matters so referred to them, as aforesaid, ready to be delivered to the said parties in difference, or such of them as should require the same, and bearing date the day and year last aforesaid, and did thereby award, &c. (*set out the award*); and the plaintiff further saith, that although he hath performed the said matters and things, by the said award by him directed to be done, yet the said defendant, although afterwards, and after making the said award and the performance of the said matters and things directed by him the said plaintiff to be by the said award performed and done, was requested by the said plaintiff so to do (*set out the matters and things awarded to be done, and the breach*), but on the contrary thereof, then and there wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the tenor and effect, true intent and meaning of the indenture, and of the covenant of the said defendant, by him in that behalf made as aforesaid; and so the said plaintiff, in fact, saith that the said defendant, although often requested so to do, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff, &c.

PLEAS.

Non est factum, Plea thereof.

In the Queen's Bench, { C. D.
 ats.
 A. B.

The day of , A. D. 18 .

And the defendant, by his attorney, comes and craves oyer of the said writing obligatory, in the said declaration mentioned, and it is read to him, &c.; and he also craves oyer of the condition of the said supposed writing obligatory, and it is read to him in these words, whereas *set (out the condition verbatim)*, which, being read and heard, the said defendant says the said supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c.

NUL AGARD, *Plea of.*

After craving oyer as above, which being read and heard, he the said defendant saith that the said arbitrators named in the said condition, did not, nor any two of them on or before the said day of A. D. , mentioned in the said condition, make any award in writing under their hands, or the hands of any two of them, of and concerning the premises in the said condition mentioned and so referred as aforesaid, ready to be delivered to the said parties in difference, and this the defendant is ready to verify, &c.

Performance, Plea of.

After craving oyer.—The defendant says, the said [arbitrators], in the said writing obligatory named as arbitrators, after the making of the said writing obligatory, and they had taken [arbitrators] upon themselves the burthen of the said arbitrament, in the said condition mentioned, and then and there did make and publish their award in writing, of and concerning the premises so to them referred as aforesaid, by which said award (*after reciting they had, &c.*) they the said arbitrators did order and award, (*set forth the award*), as by the said award which the said A. now brings into Court, will fully appear. That he did (*aver the performance in the terms of the award*) in manner and form, as in and by the said award is directed, and according to the true intent and meaning thereof, and of the condition of the said writing obligatory, and of the said promise of the defendant. And this the said B. is ready to verify, &c.

Plea, that the Arbitrator did not Award upon all Matters submitted to him.

Crave oyer as above; set out the condition, &c.—The said defendant says, that the said C., the said arbitrator in the said condition mentioned, did afterwards, to wit, on the day of , make his award in writing, purporting that he had been attended by the said parties, and that he had attended to their allegations, examined their witnesses, and all evidence and proofs produced before him touching the said matters in difference, and having duly considered the same, did award and determine of and concerning the same (*set out the whole award*). And the said defendant further says, that at the time of making the said writing obligatory, and before the making of the award, certain negotiable bills of exchange, drawn by the defendant upon, and ac-

cepted by the plaintiff, and before that time negotiated, were and remained unpaid in the hands of the holders thereof respectively, and that the indemnity or security of the defendant, as the drawer of such bills, from being called upon for the payment of the same by the respective holders thereof, was, at the time of making such writing obligatory, a matter in difference and a controversy between the plaintiff and the defendant, and that the said arbitrators, before the making of their said award, viz. on the day of , had notice thereof, but have not made or given any award or direction touching or concerning the matter and controversy last aforesaid; and that divers of the said bills of exchange, to a large amount in the whole, have not yet been paid by the plaintiff, and that the defendant hath been and still is liable to pay to the several holders of such bills the sums of money respectively mentioned in those bills. And this the defendant is ready to verify, &c.

Plea to Debt on Bond, setting forth the Award, and stating the Non-performance of a Condition Precedent.

Crave oyer of bond as above.—And the defendant says, after making the said writing obligatory, and before the said day of , A. D. , in the said condition mentioned, to wit, on the day of , A. D. , the said [arbitrators] made their award in writing, under their respective hands, of and concerning the premises in the said condition mentioned, and so referred to them as aforesaid, and ready to be delivered to the said parties in difference, and did thereby adjudge and award, that [*set forth the award, which directs the performance of the condition precedent*], as by the said award, reference being thereunto had, will fully appear, and which said matters above recited are the whole of the matters directed by the said award to be performed by the plaintiff and the defendant respectively. And the defendant, in fact, further saith, that he, on the day in the award in that behalf mentioned, to wit, on the day of , requested the plaintiff, &c. (*to perform the act directed to be done precedently*), and all other things on his part and behalf directed to be done; and that he, the said defendant, was then ready and willing to perform all things on his part and behalf directed to be performed by the said award, if the plaintiff would perform and fulfil the said matters by the said award directed by him to be performed and fulfilled, but that the plaintiff wholly refused to, &c., (*condition precedent*) and to perform the said award, in the several matters and things directed by the said award to be performed by him the said plaintiff. And this the defendant is ready to verify, &c.

AWARD IN BAR OF AN ACTION UPON THE ORIGINAL CAUSE.

In every case where parties have generally submitted their differences to arbitration, and an award has been made concerning them, such award is a good plea in bar to an action founded upon those differences, or any of them (*a*), but if an award is void, or void in that part imposing a duty upon him pleading it, the award is no bar (*b*). But payment and acceptance of money in pursuance of a void award may be pleaded as an accord and satisfaction (*c*). But where a thing is awarded in satisfaction, such thing may be pleaded in bar, though it is not performed. When nothing but releases are awarded, the award will not be a bar until the release is executed, for the award without the release is no bar (*d*). The award to be a good plea in bar must extend to the plaintiff's whole demand, if it relates only to a part of his demand, it may be pleaded to so much, and any other suitable plea to the remainder (*e*). Where there has been a submission of all matters in difference and an award has been made that the bond shall be discharged: to debt on the bond such award would be a good plea (*f*). So an award made in accordance with a submission between the defendant and another, and the plaintiff, may be pleaded to an action by the plaintiff against the defendant for the cause which was the subject of the award (*g*).

Submission to arbitration, a bar to a future action.

In pleading an award, if the period given for the per-

(*a*) *Dunn v. Murray, supra.*

(*b*) *Crofts v. Harris, Carthew, 188.*

(*c*) *Bacon v. Dubarry, Salk. 70.*

(*d*) *Freeman v. Bernard, Ld. Raym. 247. Clapcott v. Davy, Ld. Raym. 611.*

(*e*) *Com. Dig. tit. "Accord," (D 1.)*

(*f*) *Crofts v. Harris, supra.*

(*g*) *Thomlinson v. Arriskin, Comyn's Rep. 328.*

formance has not expired, it is unnecessary to aver performance, but if the day is past, such averment must be made (*h*). Where the award is that money be paid, tender and refusal are equivalent to performance; so where the award contained a condition precedent which has not been performed, it must be pleaded specially (*i*).

(*h*) Caldwell's Arb. 223.

(*i*) Com. Dig. "Accord," (D 2.); Viner's Arb. Z.; Reg. Gen., Hilary Term, 4 Wm. 4, r. 3.

FORM.

PLEA of Award to the original Cause of Action.

And for a further plea in this behalf, the said defendant says that after making the said promise and undertaking in the said declaration mentioned, and before the commencement of this suit, to wit, on, &c., the said plaintiff and the said defendant submitted themselves to stand to the award, order, and arbitration and judgment of one A. S., as well of and concerning the promise and undertaking aforesaid above supposed to have been made, as of all other matters and things then depending in controversy between them, which arbitrator having taken upon himself the burden of the said award afterwards, to wit, on the (*date of award*) awarded order, and judged between them the said A. B. and C. D., of and concerning the premises so referred to him as aforesaid, and awarded, ordered, &c. (*set out the award*). And the said C. D. further says that no cause of action has arisen or grown between them the said A. B. and C. D., from the time of the aforesaid submission. And the said C. D. saith that he hath tendered, to wit, on the day of to the said A. B., the said sum of £ , so awarded as aforesaid, and then and there offered to the said A. B., as his act and deed, a certain release in writing by him the said C. D., prepared and sealed, and bearing date the same day and year last aforesaid, whereby the said C. D. was expressed to have released to the said A. B. all matters and things depending between them the said C. D. and A. B., from the beginning of time to the day of the date of the said release; and further, the said C. D. saith he is and always hath been ready to pay the said sum of £ , so awarded as aforesaid, and to deliver the said release so tendered, which said sum of £ and the said release the said A. B. of the said C. D. to receive on the said (*date of release*), or at any other time altogether refused. And this the said defendant is ready to verify, &c.

Appendix of Cases accidentally Omitted, or not Reported, when the preceding Matter went to Press.

Withdrawal of
a juror.

Harries v. Thomas, 2 Gale, 197; 2 M. & W. 32.

"The mere withdrawing of a juror does not, in point of law, put an end to a cause: but depends upon the understanding of the parties at the time; the question of liability was expressly excluded, and yet the plaintiff seeks to shield himself under an objection, of which he was not aware when he entered upon the reference; this appears to be a breach of faith. The defendant set aside the award, with power for both again to go before the arbitrator, on the same terms as originally agreed on: we will not allow him, whose misconduct rendered the award invalid, and who refuses to accede to the terms imposed by the Court, to proceed with the original action." Abinger, C. J. 199.

Perry and Wife v. Mitchell, administrator, 12 M. & W. 798.

Award *de præ-*
missis.

Intendment in
absence of
denial.

The action was for 100*l.*, a distributive share of an intestate's estate, pleading [*declaration set out*] submission of disputes, &c., &c., relating to the several shares and claims upon or arising out of the estate and effects of the intestate; all the arbitrators joined in the award. Perry was indebted to intestate 15*l.*, and that the estate of the intestate was 929*l.* 6*s.* 9*d.*, independently of any debts owing to intestate at the time of his decease, and awarded that the administrator should pay plaintiff his distributive share of the money: the declaration then stated, the amount plaintiff was entitled to was 100*l.*, breach non-payment of the money. The plea recited that the award and that the arbitrator's award the administrator should set off 15*l.* against plaintiff's share, and pay the same, &c. Demurrer, plea neither confesses or avoids, which on argument was abandoned. "Question is, on comparing award and submission, as set out, whether it is bad; objection to the award, that it was not final, because it did not ascertain the value of intestate's estate at the date of the agreement, &c., did not state amount of debts, nor how much was plaintiff's distributive share, (citing *Baspole's case*, 8 Rep. 98.) That where it appeared by the award to be made *de præmissis* these words only imply that the arbitrators had made an arbitration of all that had been referred to them; and so it shall be intended until the contrary be shown and alleged by the other party. And Lord Holt says, alleging an award to be *de et super præmissis* supplies all averments. The award disposes of all matters in difference *specially* mentioned, and undergiven matters in difference relating to the premises, we must intend the arbitrators have awarded upon all submitted to them. It must be intended there were no differences as to the amount of the debts, because it is not mentioned in the agreement nor in the pleadings, that there were any.—*Purke, B. delivering Judgment of the Court.*

Harlow v. Read, 9 Jurist, 643.

Reference by a Judge's order—Reference to A. B. and C., so as they, &c., or any two, &c., concerning the matters referred, as to the carpenters, builders, and joiners' work, to adopt the opinion of A. as to the machinery of B. and C.; if they disagree then the arbitrators, or any two who make the award, to adopt the opinion of an umpire upon such work, nominated by B. and C. before commencement of the reference. Award set out appointment of the umpire, and that upon the consideration of his decision they made their award. The arbitrators signed the award, but not the umpire, who swore he had never been consulted upon the matter of the award. The order of reference had been made a rule of Court, but not the indorsement of the appointment of the umpire. *Tindal*, C. J. "The ground of the objection is, the false allegation that the arbitrator had taken the opinion of the umpire, when they had not consulted him: whether the allegation is true or false the award is good. The umpire had no authority to decide, unless B. and C. disagreed, between whom no difference occurred, the words would have been more properly omitted."

Power of arbitrators, award good.

Brown v. Watson, 6 Bing. N. C., 118.

Reference, by a judge's order, of a cause, and of all matters in difference, and it was ordered plaintiff should purchase, and that the defendant should sell the moiety of a brig for 940*l.*, and if arbitrator should find the moiety of it due to plaintiff from defendant, then he (the plaintiff) should pay it as directed, and the remaining moiety should be retained by the defendant in part payment of the said sum of 940*l.* for defendant's share; and should it exceed such sum the plaintiff to mortgage the brig to the defendant for the deficiency; but on the day arbitrator decreed payment of the moiety due from him, he should deliver to the plaintiff a bill of sale of the brig (defendant's share), and the plaintiff should, at same time, deliver to the defendant a mortgage of the brig, to secure the difference of the sum to be paid by him and the 940*l.*; and the arbitrators, if they thought fit, should award to the plaintiff, a compensation for providing another master, on her present voyage, in order to a speedy settlement. Award, due from the defendant to the plaintiff respecting matters in difference (including compensation), 57*l.* 17*s.* 6*d.*, and they directed a moiety to be paid on a day named, the other moiety to be retained by the defendant in part payment of his share of the brig, and each were to bear equally all debts incurred until a day named, after which the defendant was to bear no part of the expenses; and they ordered the plaintiff to deliver to the defendant at his own expense, a bond conditioned in the penal sum of 1500*l.*, conditioned for payment of all debts, in respect of brig, after a day named. Affidavit stated the debts due from time named to that of the purchase was 100*l.* and had he, the plaintiff, known the arbitrators had power to decree the payment by the plaintiff of such debts, he would not have

Award good, power of arbitrators.

assented to give so much as 940*l.* for a moiety of the brig. Application to set aside the award, as not being final and certain, as it did not state the sum in respect of compensation; and the arbitrators had no authority to direct a retainer of one-half the sum awarded; that they had not ascertained the amount of the debts to be borne in equal moieties; that there was no provision for payment of the debts, or repayment of sums from one to the other, and no power to order bond as stated in award (120). "All matters in difference are referred, and if any sum of money be due it shall be paid as the arbitrators direct. Award held good."

Award, sufficiency of.

Gingell v. Glasscock, 8 Bing. 86. Plaintiff (who was the agent of the defendant,) sold a load of hay, and remitted the price to the defendant before he (the plaintiff) was paid, the servant whom the defendant sent with the hay was imposed upon, and gave it to some other person, and not to the purchaser, who not having received the hay would not pay for it, and the defendant refused to return the money, whereupon the plaintiff brought the action. By consent the case was referred, an award was made in favor of the plaintiff; on motion to set it aside, because he who delivered the hay to the wrong person was not then acting as the servant of the defendant, but of the plaintiff who had employed him to carry the hay to the purchaser, and that the plaintiff was responsible for the hay or the price on its leaving the market; the Court held that the award was right, for at the time of the error the servant was the servant of the defendant.

Award of Court greater than the verdict.

Pearce v. Cameron, 1 Maule & Sel. 675. A verdict was taken for the damages laid in the declaration; motion was to amend the original writ, the declaration upon the record, and the order of reference, which was of all matters in difference, and affidavits stated a larger sum was likely to be recovered. "The Court cannot increase the sum as prayed, and though the arbitrator could not go beyond the damages in the cause, he might make his award for a larger sum in respect of those original matters referred to him, and though he would not have a remedy under the verdict, he might under the award." *Ellenborough, C. J.* (676).

Affidavit, sufficiency of.

Hawks v. Stocks, 9 Jurist, 451. Application to set aside an award; objection to affidavit, that it was not apparent upon the face of the affidavit that either the award or a copy was brought before the Court. The only affidavit was one by the attorney's clerk, which stated that the paper annexed was a true copy of the award of George Thomson Lester, of Bradford, &c., umpire, to whom, &c., as this deponent is informed, and verily believes. It was objected the affidavit was mere hearsay, and no explanation to excuse the usual affidavit of the execution of the award, or of an examined copy. *Coleridge, J.*, held "the affidavit was sufficient, as the opposite side withheld the award."

Eardley v. Otley, 2 Chit. 42. On failure to make a rule absolute, the Court will not send back the matter to an arbitrator on an affidavit that since the award a party had procured new evidence. "Application should have been made to the arbitrator for delay, or for another appointment." Bayley, J. "The affidavit should show some surprise, or that it was not such evidence as a reasonable man could anticipate." Abbott, J. "That it was such evidence that reasonable diligence could not have obtained." Bayley, J. Affidavit to refer back after award.

Allen v. Francis, 9 Jurist, 691. Application to set aside an award for an excess of authority in the arbitrator in not examining the witnesses upon oath. The order of reference required the witnesses to be sworn before a Judge. A witness presented himself who was unsworn, it was argued the witness need not be sworn, and so the arbitrator decided, and received the evidence; the defendant objected, and desired the arbitrator to note the objection; but ultimately the defendant's own witnesses were examined unsworn. Wightman, J. "You might have declined to go on, it seems to me like a waiver. Your course plainly was not to go on farther. It seems to me you chose to go on after the witnesses were examined unsworn, and allowed your own witnesses to be so examined, thereby taking the chances of a verdict in your favour, you must be taken to have waived the objection." Wightman, J. Rule refused. Waiver.

Crump v. Adney and Page, 1 C. & M. 355. Where a submission contains the words, "shall and may;" they are words imperative, and such proviso must be inserted in the award. (361.) Lyndhurst, C. B. Award containing an express proviso, effect.

King v. Earl of Dondonald, 5 D. P. C. 589. Assumpsit for goods sold, plea, non-assumpsit, except as to 30*l.* for that payment, replication, payment on a different account, *absque hoc*, cause was referred before issue joined, award for defendant on non-assumpsit, and also as to 3*l.*, part of sum of 30*l.*, and as to residue for plaintiff. Application to set aside the award for uncertainty. The replication is not a new assignment, it takes issue on the plea with a special inducement, and on that issue the arbitrator finds for the defendant as to 3*l.*, and for the plaintiff on remainder, *i. e.* damage on that issue 27*l.* Parke, B. (590). Rule refused. Certainty of award.

Daubez v. Rickman, 4 D. P. C. 132. Costs of cause were by agreement to abide the event. The award being in favor of plaintiff as to one of the issues of the breach of covenant charged in the declaration, the prothonotary taxed the costs for the plaintiff, and refused to tax the costs of the issues found for the defendant; rule to review the taxation: regard being had to the 74th rule of Hil. 2 Wm. 4, and of the agreement of reference in this case; the issues, wherein arbi- Costs of issues.

trator has determined that the plaintiff has sustained no injury, have been found for the defendant, the cause by agreement is at issue. The plaintiff cannot contend that cause was referred for judgment only to entitle him to costs, and not so for all purposes. *Tindal, C. J. (133.)* Rule absolute.

Joinder of a third person in an award is bad.

Hawkins v. Benton, 9 Jurist, 110.

To show cause why defendant should not pay the amount of the award and the Master's allocatur, action of trespass was referred by a rule of Court; verdict to be entered for the plaintiff, 50*l.*, subject to the award of an arbitrator, to settle all matters in difference between the parties in the action, and to determine what shall be done by either respecting the matters in dispute; costs of the cause to abide the event, and all other costs to be in the discretion of the arbitrator. Award, cause to be no further prosecuted, the plaintiff had good cause of action, and that the defendant pay 40*s.* to Sarah Hawkins and William Cole, who consented to become a party in the cause. "The cause of *Hawkins v. Benton* was referred, and all matters in dispute between Cole (not a party to the cause, but introduced in the order of reference) and the defendant. The award treats the case as if the cause was that of *Hawkins and another v. Benton*. It appears doubtful whether the arbitrator can introduce a new party into the original action, or whether there ought not to be a substantive and independent finding as to any cause of complaint which Cole might have against the defendant. This is very much the same as a motion for an attachment, and requires the same strictness. The plaintiff has another remedy by action on the award."—*Williams, J.* Rule discharged, without costs.

Costs, taxation of.

Elleman v. Williams, 2 D. & L. 48.

"I conceive, where a sum is recovered of a less amount than 20*l.*, the Master is bound to tax the costs upon the lower scale; if he does not, the Court will direct a reviewal of the taxation."—*Cole-ridge, J.* See *Balleys v. Gresley*, 8 East, 319.

Clerical error.

Hewitt v. Clements, 9 Jurist, 17.

A cause was referred under the usual order of reference, containing a clause that in the event of an objection being made by either party, the Court should have power to refer the matter back to the arbitrator. The plaintiff's Christian names were "Joseph Charles:" the award stated the names as "James Charles." By the affidavit of the arbitrator's clerk, it appeared to be a clerical error. "The clause giving the Court power to refer a matter back should be construed liberally; and as the mistake was merely a clerical error, we think the award should go back to the arbitrator."—*By the Court.*

APPENDIX OF FORMS.

SUBMISSION (a).

Simple Agreement between Two Persons consenting to refer their Differences to the Arbitrament of one Arbitrator, to be made by a Day named, with Powers to make the same a Rule of Court, to examine all Evidence Written and Oral, to be Furnished by the Parties; Arbitrator to give Notice of the Time of holding of each Meeting, the Costs of the Reference to be in the Decision of the Arbitrator (b).

ARTICLES OF AGREEMENT made, and entered into the day
of 18 ; BETWEEN A. B. of, &c. of the, &c.

WHEREAS several disputes and differences exist between the said
A. B. and C. D.

NOW THESE PRESENTS WITNESS, and it is hereby agreed, between the said parties hereto; That all disputes and differences, which exist between the said parties, shall be referred to the arbitration of : AND the award of the said , if made in writing under his hand and seal, ready to be delivered to the parties hereto on or before the day of now next shall be binding and conclusive on the said parties:

AND that, for further and better enforcing the performance and observance of such award, the reference or submission thereby made, shall be made a rule of her Majesty's Court of Queen's Bench (or other Court) at Westminster, according to the statute in that case made and provided.

AND further, that the parties hereto, and each of them, shall and will produce and shew forth, to the said arbitrator, all such deeds, evidences, and writings, relative to the premises in question, as shall

(a) It was in the first instance intended to give a series of submissions upon every variety of recital, and the author had proceeded far with his original design, when it was suggested that one or two recitals would be sufficient as a guide, and it was beside found to be almost impossible to frame forms to meet every statement of facts, for they necessarily must vary with each case; a blank form of a submission is appended at the end of the forms relating to submissions, in which the various positions of the clauses are pointed out, and which it is trusted will be found to suffice for any practical purpose.

(b) Where there are more parties than two, (i. e., two parties against one or two against two) then the variations in the body of the agreement must be made to meet the difference, as each or either of them, or of the said parties respectively, &c.

be in the possession or power of the said parties, or either of them, or which the said parties or either of them may or can procure without suit at law or in equity, so that the said arbitrator may examine and inspect or peruse the same, for the purpose of enabling him to make the said award :

AND that the said parties hereto, and each of them, shall and will so far as in them respectively lies, furnish the said arbitrator with such other evidences, proofs, and documents ; and do all such other acts and things, for better enabling him to make the said award, as the said arbitrator shall require :

AND that the said arbitrator shall, for the purpose of enabling him to make the said award, be at liberty to go into parol, as well as written evidence, and to examine the said parties in difference, or either of them, and such other witnesses as he shall think proper, on oath :

AND that the said arbitrator shall give at least days previous notice to each of the said parties, or their respective solicitors, of the day on which he intends to hold his first and every subsequent sitting on the said arbitration :

AND that all costs and charges attending the said arbitration, shall be in the discretion of the said arbitrator, and shall be paid and satisfied pursuant to his award.

AND LASTLY, that neither of the said parties shall bring any action or suit, against the other of them, in relation to the premises, or against the arbitrator. IN WITNESS, &c.

AGREEMENT to refer Matters of Account in dispute between a Creditor and Two Debtors, the Dealings being between the Creditor and one Debtor to a certain Time, and from that Time between the Creditor and both Debtors ; a Balance is admitted to be due ; with Clauses to Appoint how the Balance is to be Paid, the Costs to be in the discretion of the Arbitrators, with an Agreement for the said Parties to keep the Award, and to prevent affected Delay, with a Clause that a certain Sum shall be Paid into Court to abide event of Award, with Power to dispose of Actions and Suits in Equity.

IN THE HIGH COURT OF CHANCERY.

Between	{	A. and B., Plaintiffs,
		and
		C. . . Defendant.
		and
Between	{	the above named C., Plaintiff,
		and
		the above named A. and B., Defendants.

ARTICLES OF AGREEMENT, &c. (*Supra*, p. 1.)

WHEREAS there have been divers dealings and transactions between the above-named C. and A., before and since the day of 18 , on which day there was due and owing from the said A., to the said C., the sum of ; and there have been also divers dealings and transactions between the said C., and the said A., and B., since the said day of 18 ; and several questions and disputes have arisen, and are subsisting, not only between the said C. and A., but also between the said C. and the said A. and B.:

AND there is now depending an action at law, wherein the said C. is plaintiff, and the said A. and B. are defendants; and two suits are also depending in the High Court of Chancery, in one of which the said A. and B. are plaintiffs, and the said C. is defendant; and in the other of the said suits, the said C. is plaintiff, and the said A. and B. are defendants, touching the said dealings and transactions, and the accounts relating thereto.

Now for the putting an end to the said action and suits, and for divers other considerations them thereunto moving, *It is hereby mutually agreed* between the said C., A., and B., to refer all questions, disputes, and controversies, in any wise relating to, or touching, or concerning such dealings or transactions, as well between the said C. and the said A. as between the said C. and the said A. and B., and the accounts relating thereto, to the award, arbitrament, and determination, of , arbitrators indifferently named and chosen by the said parties hereto.

AND *it is hereby expressly agreed*, that the said arbitrators shall investigate the whole of the accounts, dealings, and transactions between the said parties, and award such sum or sums as they shall find due from the said A. and B., or either of them, jointly or separately, to the said C., and shall determine the true balance or balances between the said parties, upon the whole of the accounts, dealings, and transactions between the said parties:

AND shall appoint how, and in what proportions such balances shall be paid, and by whom, and to whom:

AND also shall have power to direct the said action to be discontinued, and the said suits to be dismissed, the costs of the said suits and actions, and of the reference and award, to be in the discretion of the arbitrators.

AND *the said parties do hereby severally and respectively agree*, well and truly to stand to, perform, and keep the award, arbitrament, and determination, of the said arbitrators, (*or any two of them*), touching and concerning the several matters hereinbefore mentioned, so as the said award be made in writing, under the hands of the said arbitrators, or any two of them, and ready to be delivered to the

said parties, or such of them as shall desire the same, on or before the day of now next.

AND *it is hereby further mutually agreed*, that no action, suit, or other proceeding at law, or in equity, shall be brought, commenced, or instituted against the said arbitrators, any or either of them, for or by reason of any award to be made by them, under this reference; but this agreement shall and may be pleaded in bar to any such suit, or action.

AND FURTHER, that the said arbitrators shall have power to examine the parties, and their witnesses, on oath, and call for books and papers, in the possession or power of either of the parties:

AND that each of the said parties shall in the mean time be at liberty to inspect, peruse, and have copies (at his or their own costs and charges) of all, or any, or either of the books, papers, and writings, to be produced in accordance with the power above given.

AND if either party shall, in the opinion of the arbitrators, (*or the majority of them,*) without good and sufficient cause, by non-attendance, or non-production of books, papers, or writings, or otherwise, delay or impede, or attempt to delay or impede the progress of the said arbitrators, in making their said award, the arbitrators, (*or the majority of them,*) shall be at liberty to proceed *ex parte*, after two days clear notice to the party or parties causing such delay or impediment, as aforesaid, to be left at his or their dwelling or counting house:

AND *it is hereby agreed* that all proceedings at law, or in equity, shall be stayed until the said day of ; when, if no award shall be made, the said parties shall be at liberty to proceed at law, or in equity, as they or either of them shall be advised, or can or may do according to the course of the courts, and the injunction obtained by the said A. and B., shall have its full effect, till the same shall be dissolved.

AND the said A. and B. do hereby agree, immediately after the agreement or submission to reference shall be made a rule or order of her Majesty's Court of to pay to the said C., the sum of in lawful money of Great Britain in part of the debt admitted to be due to the said C.

AND the said C. doth hereby agree, that if no award shall be made within the time hereinbefore limited, that he the said C. shall and will, within one week after the expiration of the time for making such award, pay into the hands of the proper officer of the said Court of , the said sum of , or such part thereof as shall have come to his hands, or to the hands of any person on his account, and for his use.

AND *it is hereby agreed* between the said C. and A. and B., that the said sum of or such part thereof as shall be so paid into the said court, shall be subject to the order and determination of the said court.

AND LASTLY, *it is hereby agreed* by and between the said parties, that this their submission shall be made an order or rule of her Majesty's Court of at Westminster, pursuant to the statute in such case made and provided. IN WITNESS, &c.

AGREEMENT by Several to refer certain Disputes arising from Claims under certain Wills to Arbitration. (Recital of Differences in an Article of Agreement, &c.)

WHEREAS divers differences and disputes have arisen between A., B., and C., his wife, D. and E., and the above named F., as to their several and respective claims and interests, under the several and respective wills of G., late of, &c., deceased, H., late of, &c., deceased, and J., late of, &c., deceased; and they have severally and respectively agreed to submit the same to the arbitrament and final determination of , &c., and that their award, or the award of any two of them, shall be final and conclusive, both at law and in equity, as well on the part and behalf of the above A., B., and C., his wife, D., and E., their heirs, executors, and administrators, as on the part and behalf of the above named F., his heirs, executors, and administrators. (*Add the various conditions.*)

SUBMISSION by Landlord and Tenant, concerning Breaches of Husbandry Considerations.

ARTICLES OF AGREEMENT, &c., *supra.*

WHEREAS by indenture of lease, bearing date on or about the day of 18 , and expressed to be made between A., of the one part, and B., of the other part; for the considerations therein mentioned, the said A. did demise and let unto the said B., &c., a certain messuage and lands in the said indenture of lease particularly described: To hold the same unto the said B., &c., for the term, &c., subject to the rent, covenants, conditions, and agreements therein contained; and amongst which is a covenant that he the said B., &c., would use all the arable lands thereby demised, during the said term, in such a course of husbandry as is therein expressed.

AND WHEREAS the said B. hath not farmed or cultivated the said arable lands according to the course prescribed by the said recited covenant; whereby the premises so demised to him as afore-said have sustained great damage and injury. AND WHEREAS, in consequence of such breaches of covenant, the said A. lately threatened the said B. to commence an action of ejectment against him, for the recovery of the possession of the said premises. AND WHEREAS in order to prevent such action the said B. hath

proposed to the said A. that all disputes and differences in respect of the aforesaid breaches, and the liabilities, if any, of the said B. by reason thereof shall be referred to the arbitration of the persons and in manner hereinafter mentioned, and the said A. hath agreed to such proposal. Now it is hereby agreed and declared between and by the said A. and B., that all questions, disputes, controversies, and differences in respect of the aforesaid breaches of covenant, and the liabilities of the said B. by reason thereof shall be, and the same are hereby referred to of and of and their umpire, to be appointed as hereinafter mentioned, who shall determine and settle all the said differences, disputes, controversies, and liabilities, and that the said arbitrators so nominated shall before they proceed to investigate the matters in difference, nominate a third person to act by way of umpire. (*Add the powers of the arbitrators and the agreement of the parties to abide by the award, &c. &c.*)

RECITAL in an AGREEMENT between A. and B. to refer Disputes concerning the Ransom of a Ship and Cargo, which was captured by Privateers.

ARTICLES OF AGREEMENT, &c., (*supra*).

WHEREAS the said A. did, in the month of 18 , receive on board the ship called the , whereof he was master, a cargo of wheat and barley, the property of the above named , to be transported from aforesaid to Ham-
burgh, and there to be delivered. AND WHEREAS the said shortly afterwards sailed, and being on his passage taken by a French privateer, he agreed with the captain thereof for the ransom of the said ship and cargo for pounds, and delivered one of his servants to the said captain as a hostage for securing the due payment thereof. AND WHEREAS the said ship and cargo, soon after her arrival at Ham-
burgh, were appraised by persons in that behalf nominated, to the intent that the respective values thereof might be ascertained, and that both might rateably and proportionably, according to their values, bear a just part of the said pounds. AND WHEREAS of, &c., having insured to the said , several sums of money upon the said cargo, for the voyage above described, and consequently being interested in the valuation of the said ship and cargo, they and the said A. have insisted, that the aforesaid appraisement of the said ship was partially or injudiciously made; and on that account differences as to the proportion which the said ship and cargo ought respectively to contribute towards payment of the said pounds, have arisen between the said parties: for adjusting whereof, the said A. and

B. have agreed to submit the same to the arbitrament and award of, &c., &c., *supra*. And the said B. hath undertaken that such determination shall be binding and conclusive to the said insurers, as to any claim or demand which they or either of them have or may have upon the said , by reason of the premises, &c. &c. (*add clauses*).

RECITAL in a SUBMISSION by Partners, in Pursuance of a Covenant contained in the Articles of Partnership,

ARTICLES OF AGREEMENT, &c. (*supra*.)

WHEREAS by articles of copartnership (or agreement) bearing date on or about the day of 18 , and made between the said of the one part, and the said of the other part, amongst other things, *It was covenanted and agreed*, that in case any dispute or question should arise between the said parties relative to the construction of the said articles, or to all or any of the matters or things therein contained, the same should be referred to the arbitration of two indifferent persons, one to be named by each of the parties, with power for such arbitrators to appoint an umpire in case of their disagreement: AND that the award of the said arbitrators or umpire should be final and conclusive. AND WHEREAS disputes have arisen between the said parties relating to their copartnership matters, (and also relating to several other matters and things) and they have, in pursuance of the said covenant, agreed to refer the same to, &c.

SUBMISSION BY BOND.

BOND of ARBITRATION *from one to one, in the common Form (a)*.

KNOW ALL MEN BY THESE PRESENTS, That I, of , in the county of , am held and firmly bound to , of , in the county of , in the sum of pounds, of lawful money of Great Britain; to be paid to the said , or to his certain attorney, executors, administrators, or assigns: For which payment to be well and truly made, I bind myself, my

(a) This bond can be varied to meet the necessities of the case, if it be by two persons covenanting with one, then it must be so expressed.

heirs, executors, and administrators, and every of them, ~~firmly~~ by these presents; *Sealed with my seal*: DATED this day of , in the year of the reign of our sovereign lady Victoria, by the grace of God of the united kingdom of Great Britain and Ireland, queen, defender of the faith; and in the year of our Lord, 18 .

THE CONDITION of the above written bond or obligation is such, *That* if the above bounden , his heirs, executors, and administrators, on his and their part and behalf, should in all things well and truly stand to, perform, and keep the award and arbitrament of of &c. arbitrators indifferently elected and named, as well on the part and behalf of the above bounden , as of the above-named , to award, order, arbitrate, judge, and determine of and concerning all actions, causes of action, suits, specialties, controversies, damages, claims, and demands whatsoever, both at law and in equity, which at any time or times heretofore have been had, made, brought, commenced, sued, prosecuted, or depending by and between the said parties; *So as* the said award be made in writing, under the hands of the said , and ready to be delivered to the said parties in difference, or to such of them as shall desire the same, on or before the day of , now next ensuing, *Then* the above written bond or obligation shall be void, and of no effect.

SIGNED, SEALED, AND DELIVERED, }
(being first duly stamped) in the }
presence of }

BOND from one to one, recital of Disputes and of a Suit in Chancery commenced thereon, with Provision for the Suit to stay, and reference, &c.

BOND, (*supra*).

WHEREAS divers differences and disputes have arisen, and are at present subsisting between the above bounden and the above-named , and a certain suit in the High Court of Chancery is now pending, wherein the said is the plaintiff, and the said is the defendant; and there are divers accounts now subsisting and unsettled between them the said and . AND WHEREAS it has been agreed, that immediately upon the execution of the above written bond or obligation, the said suit in Chancery shall be no further prosecuted or proceeded in, but shall be dismissed out of the said Court; and that the said parties shall take all proper steps in order to procure the same to be so dismissed. AND WHEREAS it has been agreed, that all such differences and disputes as aforesaid, and all such unsettled accounts

as aforesaid, shall be referred to the hearing, arbitrament, and determination of of, &c. &c. (*infra*).

SUBMISSION by Bond by Six Copartners, to two Arbitrators, and to a third Arbitrator to be appointed by the two.

TWO BONDS. A joint and several bond, from A. B. and C., to D. E. and F.; the other, a joint and several bond from D. E. and F., to A. B. and C. (*Bond, supra.*)

WHEREAS, the above-bounden A. B. and C., and the above-named, D. E. and F., were sometime ago concerned together in trade, as ; and whereas, divers differences and disputes have arisen, and are now depending between the above-bounden A. B. and C., and the above-named D. E. and F., with respect to such copartnership trade, and the accounts relative thereto, and whereas, it hath been agreed by and between the above-bounden A. B. and C., and the above-named D. E. and F., that all accounts relative to the said copartnership trade, and all differences and disputes between the said parties with respect thereto, shall be referred to the award, arbitrament, and umpirage, final end, and determination of, then umpire (*supra*). NOW THEREFORE THE CONDITION of the above-written obligation is such, that if the above-bounden A. B. and C., and each of them, their and each of their heirs, executors, and administrators, and every of them do and shall, on his and their respective parts and behalves, in all things well and truly stand to, obey, &c., and keep the award, &c., to be made by the said , and such third person so to be appointed as aforesaid, or by any two of them, of and concerning the said copartnership, trade and dealings, and all accounts, differences, and disputes relative thereto, and of, and concerning all actions, and causes of action, suits, claims, and demands whatsoever, now or at any time heretofore had, moved, brought, or depending, by or between the said parties, or any of them, or any other person, or persons whomsoever, claiming to be a creditor, or creditors upon the said parties, or any of them, with respect to all, or any of the matters hereinbefore agreed to be referred, so as such award, &c., be made in writing, and ready to be delivered to such of the said parties or to the executors or administrators of the said parties or either of them, in case of the death of them, or either of them, as shall require the same within one calendar month next ensuing the day of the date of the above written obligation, or on or before the day of next ensuing the date hereof: or in case the said arbitrators should not make such their award by the time last mentioned. Then this obligation to be void, &c. &c.

CONDITION of an Arbitration Bond for referring the Accounts of Executors to two Arbitrators and an Umpire to be chosen by the Arbitrators.

COMMON MONEY BOND from E., the executor of B., to D., widow of A., and to Z., the son of A., and D. in 2,000*l*.

WHEREAS the above-named A., the father, deceased, by his last will and testament, in writing duly executed, bearing date on or about did, among other things, make and appoint the above-named B., together with C., esquire, executors and trustees of his said will, during the minority of the above-named Z., his son, for the intent and purposes therein mentioned and expressed, as by the said will by them the said executors duly proved may appear: by virtue of which will and executorship, they the said B. and C., severally possessed themselves of great part of the personal estate, late of the said A.; and also received great part of the rents of his real estates, and have since respectively paid, applied, and disposed of great part of the said estate so by them received, upon the trusts of and according to his said will. *And whereas* the said Z., the son, having attained his age of twenty-one years, an account of what was by him, the said C., received, and which remained in his hands of the real and personal estates, late of the said A., the testator having been then stated, settled, and allowed by and between them the above-named D., Z. her son, and the said C.; and he the said C. having accounted for and paid what was by him so received and remaining in his hands, to them the said D. and Z., according to the true intent of the said will they the said D., and Z. her son, have given a full release and discharge to the said C. of all their demands, relating to his acting in the said executorship and trusts, by the said will in him reposed: *And whereas* the said B. sometime since departed this life, having first made and duly executed his last will and testament in writing, and thereof appointed the above-bounden E. executor, as by the same will, by him duly proved, may appear: *And whereas*, the said B., in his lifetime, as being the other executor of the said A., the father, did receive, pay, and apply some part of the real and personal estate of the said A., pursuant to the trusts in the said will contained; but he, the said B., dying in the minority of the said Z., the son, and no account having been made and settled, as to what was by him, the said B., so received and paid out of the said estates; and he, the said E., as executor and representative of the said B., being now liable to make up such account, and to answer and pay the balance thereof, unto them, the said D. and Z. (if any such shall appear due), and such account having been by him, the said E., delivered to them, the said D. and Z., and some disputes and differences having arisen between them, touching some articles and

vouchers in the said account mentioned and contained, they, the said E., and the said D., and Z., for the ending and preventing of all further and future disputes, actions, and suits, touching the same account, have mutually agreed to refer the same to the arbitrament and determination of _____, of, &c. &c., (*clauses as agreed: to follow*).

RECITAL in an AGREEMENT to refer by Husband entitled in the right of his Wife.

WHEREAS several differences and disputes have arisen, and are still depending, between the said parties hereto respecting the said legacy and administration by the said C. D. of the assets of the said E. F.: *Whereas* E. F., by his last will and testament amongst other things, bequeathed and gave absolutely to G. H., the wife of the said A. B., a legacy of one thousand pounds, and constituted and appointed the said C. D. executor of his said will, and the said C. D. has duly proved the said will, &c., and entered upon the duties thereby imposed: *And whereas* the said parties being desirous of accommodating and ending the differences which have arisen respecting the matters aforesaid, the said A. B. in right of his wife G. H., and C. D. have consented to refer the said difference of and concerning the said matter in dispute to the arbitrament of, &c.

COVENANT by Several with Two, to abide by the Award of Three Arbitrators, respecting Disputes between them; under a Penalty severally, for Non-performance.

WHEREAS many disputes and differences are depending between _____ of, &c., and other the persons whose names and seals are hereto set and subscribed, or some of them, on the one part; and _____ of, &c., widow, and [other covenantee], her daughter, or one of them, on the other part. AND WHEREAS as well the said _____ and other the persons whose names and seals are hereto set and subscribed as aforesaid, as the said _____ and _____ have submitted, and do hereby respectively submit the said disputes and differences to the award and determination of, _____ of, &c. *So as, &c., supra.* NOW BE IT KNOWN, that the said _____, and other the persons whose names and seals are hereto set and subscribed as aforesaid, do hereby severally, and for their respective heirs, executors, and administrators, covenant, promise, and agree to and with the said _____ and _____ severally, their respective executors and administrators, that they the said _____ and other the persons whose names and seals are hereto set and subscribed as aforesaid, shall and will abide by, and well and truly perform and keep the

award and determination of the said arbitrators concerning the premises to be made as aforesaid. AND for the true performance of the said award on their part, the said and other the persons whose names and seals are hereto set and subscribed as aforesaid, do hereby severally and respectively bind themselves and their respective heirs, executors, and administrators, unto the said and severally, and their respective executors and administrators, in the penal sum of pounds. IN WITNESS whereof the said covenanting parties have hereto set their hands and seals the day of 18 .
SIGNED, &c.

SUBMISSION BY RULE OF COURT, &c.

Rule of Reference in the Court of Queen's Bench.

IN THE QUEEN'S BENCH.

Saturday, the day of in , in
the year of the reign of Queen Victoria.

A. v. B. { UPON hearing Mr. , of counsel for the plaintiff,
 and Mr. , of counsel for the defendant, and by
 their consent it is ordered, that all matters in difference
in the cause between the parties ("*or all matters in difference between the parties in this cause,*") be referred to the award, order, arbitration, final end, and determination of , of , esquire, barrister at law, so as the said shall make and publish his award in writing, of and concerning the matters in question, on or before the day of next, to the said parties, or to either of them that shall require the same, or to their personal representative, if either of the said parties shall, before that time, depart this life, with liberty to the said arbitrator, by indorsement under his hand, upon this rule, or an office copy thereof, to enlarge the time for making his said award, if he shall see necessary; and that the said parties shall and do perform, fulfil, and keep such award, so to be made as aforesaid, &c. (*Add the clauses as agreed*).

By the Court.

Commencement of a Judge's Order by a Reference.

IN THE QUEEN'S BENCH.

A. v. B. { UPON hearing the attornies on both sides, and by their consent, I order that all matters in difference between the parties (or, "*all matters in difference in this cause,*") be referred to the award and arbitrament. (*Add the necessary clauses according to the intention of the parties.*)

Commencement of an Order of Reference at Nisi Prius.

LONDON, { At the sitting of *Nisi Prius*, held at
to wit. { in and for the city of *London*, on the
day of in the year of our Lord 18 , and in the
fourth year of the reign of our sovereign lady *Queen Victoria*, now Queen of the United Kingdom of *Great Britain and Ireland*, before the right honourable *Thomas, Lord Denman*, chief justice of our lord the king, assigned to hold pleas before the king himself.

A. v. B. { IT IS OFFERED by the Court, by and with the consent of the parties, their counsel and attornies, that the jury find a verdict for the plaintiff, damages 1000*l.*, and costs 40*s.*, subject to the award, order, arbitrament, final end, and determination of , esquire, barrister at law, to whom all matters, &c. (*Add clauses as to the intention of the parties.*)

Commencement of an Order of Reference containing several Special Provisions.

IN THE QUEEN'S BENCH.

A. v. B. { UPON hearing the attornies or agents on both sides,
B. v. A. { and by their consent, I do order and it is agreed that all matters in difference and dispute in these actions save and except a sum of , advanced by the said A. to the said B., which the said B. admits to be due to him the said A., and also between the said parties in relation to an action of ;" in which an execution has been issued by the orders of the said (except, &c. &c.) and all other matters, claims, and demands in difference and dispute between them, particularly as regards, &c., be referred to the award and arbitrament of , esquire, barrister at law, so as he shall make and publish his award, &c. &c.

Commencement of an Order at Nisi Prius when a Juror is withdrawn.

BY THE COURT.

— (to wit). At the sitting of Nisi Prius, holden at the
in the of , on , the day of ,
in the year of our Lord 18 , before the right honourable Thomas,
Lord Denman, chief justice of our lady the Queen, assigned to hold
pleas before the Queen herself (or, in the Common Pleas, “before the
right honourable Sir Nicholas Conygham Tindal, knight, her Majesty’s
chief justice of the bench,” or, in the Exchequer, “before the right
honourable James Lord Abinger, chief baron of her Majesty’s Court
of Exchequer:” or (if the sitting be holden before a puisne judge or
baron, in the absence of the chief justice or chief baron,) “before the
honourable , one of her Majesty’s justices or barons, assigned
to hold pleas before the Queen herself,” or “in the court of our lady
the Queen of the bench,” or “of her Exchequer:” or if at the assizes,
“before the honourable , one of the justices of the court of
our lady the Queen before the Queen herself,” or, “of the bench,” or,
one of the barons of our lady the Queen) of her court of Exchequer,
and others their fellows, justices assigned to take the assizes in and
for the said county.”) To be inserted into submissions, whether by
general clauses, agreement by bond.

By the Court or a Judge.

Clause providing against Death of either Party.

AND in case the said parties hereto or either of them shall
then be dead, so as such award shall then be ready to be delivered
to the executors or administrators of such party deceased.

Clause providing against Death of Arbitrator, or refusal to Act.

PROVIDED ALWAYS, and it is hereby declared and agreed by and
between the said parties to these presents that if either of the said
arbitrators shall refuse to act or award, or shall die before making
the said award, or become incapable of proceeding with the arbi-
tration or of making the said award, then the two remaining
arbitrators are hereby empowered and directed to appoint another
barrister at law as arbitrator along with themselves who shall have
and possess all the powers and authorities of the said arbitrators so
first appointed as aforesaid. And also that in case two of the said
arbitrators shall refuse to act or award, or shall die before making
their award or become incapable of proceeding with the said arbi-
tration, or of making their award, then the remaining arbitrator is
hereby empowered and required to appoint two other barristers at
law who shall have and possess all the powers and authorities of the
said two before named arbitrators so before appointed as aforesaid.

CLAUSE provided against Non-appointment of Arbitrator, according to Agreement.

AND further that if either the said parties shall neglect to appoint an arbitrator within the space of fifteen days after the passing of the said intended act, it shall be lawful for the said or for the said (as the case may be) to appoint an arbitrator for and on behalf of the party so neglecting to appoint such arbitrator, in addition to the arbitrator who may have been previously nominated by the said or by the said (as the case may be) and the said arbitrators so appointed shall have the same powers in all respects as if they had been appointed by each party in manner first hereinbefore mentioned.

POWER to enable Arbitrator to have the assistance of an Accountant.

AND if the arbitrators, or the majority of them, shall think it necessary, they shall be at liberty, and are hereby authorized to appoint an accountant to their assistance; the expense of such accountant to be paid, one-half by the said , and the other half by the said and ; such accountant to be sworn to the truth of the account, or statement, to be made out by him.

CLAUSE directing the Expenses of the Reference.

AND it is hereby agreed by all the parties, that the expense of the arbitration and award shall be paid, one-half by the said , and the other half by the said and .

If two Arbitrators. Clause to appoint an Umpire.

"AND in case the said arbitrators should not make such their award of and concerning the premises within the time limited as aforesaid, then the said umpire to be appointed as aforesaid shall proceed upon the same arbitrament, and shall in all things abide by and conform to the stipulations appointed by the said arbitrators to be observed as aforesaid; So as the said umpire do make his award and umpirage in writing under his hand, and ready to be delivered to the said parties in difference, or to such of them as shall desire the same, on or before the day of , now next . Then," &c.

CLAUSE empowering the Arbitrators to Name an Umpire.

OF such third person as they the said arbitrators shall by writing under their hands [to be indorsed on these presents], indifferently nominate as umpire, in and concerning, &c. (*ut supra*).

CLAUSE to make Submission, &c. a Rule of Court.

AND the said , doth hereby consent and agree, that this his submission shall or may be made an order or rule of her Majesty's Court of at Westminster, at the instance of the said , his executors or administrators.

POWER to Examine the Parties.

AND the said doth hereby further consent and agree that the said arbitrators (and umpire) shall, for the purpose of enabling them (or him) to make the said award (or umpirage), be at liberty to go into parol, as well as written evidence; and to examine the said parties in difference, (or any) or either of them, and such other witnesses as they or (or he) shall think proper on oath.

POWER to enlarge the Time.

OR, on or before such other day, not beyond the day of , as the said arbitrators (or any two of them) shall, by writing under their hands, [to be indorsed on these presents], from time to time appoint.

CLAUSE to empower Arbitrators to proceed ex parte in event of Non-attendance.

AND it is also agreed, that it shall be lawful for the said arbitrators, or any two of them, to proceed *ex parte* with the said arbitration, in case of the non-attendance of either of them the said parties hereto, after days' previous notice in writing being given for that purpose, or left at his last usual place of abode, or at the office of his solicitor for the time being.

CLAUSE. *Direction as to finding the Balance and ordering Securities.*

AND by the like consent, I further order, that if the said arbitrator shall find a balance due from the said to the said , or shall find a balance due from the said to the said , the arbitrator shall direct what securities shall be executed by the party or parties against whom the said balance shall be found, together with interest for the same, and that the said arbitrator shall direct what deeds, papers, or writings, belonging to the said , or either of them, now in possession of the said , shall be delivered up to the said .

CLAUSE *making Order of Reference a Rule of Court.*

AND by the like consent, I further order, that this my order may be made a rule of this honourable Court, if the same Court shall so please, and that this reference shall not abate by the death of either party.

CLAUSE *authorizing delivery of Postea.*

AND it is also ordered, (*if so agreed*), that the *postea* shall remain in the hands of the associate, until the said arbitrators (*or umpire*) shall have made and published their (*or his*) award, and then it shall be delivered to the party entitled to the same.

CLAUSE *enabling Arbitrator to reserve points of Law for the opinion of the Courts, with Power for the Court to refer back matters for the consideration of the Arbitrator.*

AND further, that the said arbitrator shall be at liberty to reserve any points of law for the opinion of the Court whereof the submission is made a rule, if he is requested to do so by either of the parties hereto, or their solicitors; and the said Court, if it should think fit, is hereby empowered to refer back as often as the said Court shall think proper to the said , all or any of the matters hereby referred, in order to the final end and adjustment of the said disputes and differences between the said parties.

Costs to abide Event.

AND it is agreed by and between the parties hereto, that the costs of the cause of the reference, and the award shall abide the event of the said award.

CLAUSE empowering the Arbitrator to certify as a Judge at Nisi Prius.

And further, it is agreed by the said parties, that the arbitrator (*as the case may be*) shall have the like power as a Judge has at nisi prius to certify that the action hereby referred was brought to try a right besides the mere right to recover damages for the said trespass and grievance as in the declaration set forth.

Costs to be in the discretion of the Arbitrator.

AND it is agreed, that the costs of the cause of the reference and the award, shall be in the discretion of the said _____, to direct and determine what shall be done in respect thereto.

CLAUSE to enable the Court to refer back Matters for the Consideration of the Arbitrator.

And further, it is agreed by and between the parties hereto, that if the award of the said arbitrator to be appointed as hereinbefore mentioned should not be conclusive of the said matters in difference, that it shall be in the power of the Court whereof this submission shall be made a rule according to the provision hereinbefore recited, to send the said matters hereby referred, or any of them, back to the said arbitrator for his reconsideration, and his subsequent determination or determinations shall be taken to be a part of the said award, and shall be conclusive upon the said parties, and it is also agreed between the said parties hereto, that the said Court shall have power to appoint such a time (with power to enlarge the same) for the reconsideration of the said matter or matters referred back to the said arbitrator as shall be deemed necessary, and that whether the time originally limited has or has not been enlarged, or has expired by efflux of time.

A CLAUSE in a Submission, agreeing that a general Award shall be conclusive upon the Parties, as to the matter of the Costs.

And further, it is agreed between the said parties hereto, that the said arbitrator shall be at liberty to make his award generally in favor of one or other of the said parties, without reference to the particular issues which may have been joined between the said parties, and that such general finding shall be conclusive on the said parties, and as effectually decide all the said issues with respect to the costs, as though he the said arbitrator had decided upon each of the issues severally.

BLANK form of Submission.

Articles of agreement, &c. (*supra*, p. 1, *if the submission is by bond, then supra*, p. 7, *et infra*).

Whereas several disputes, &c. &c. (*set out the matters, disputes, and differences, supra*, p. 1, 3, 5, 6, 7, 11).

Now these presents witness, and it is hereby, &c. &c. (*set out the matters referred. The appointment of the arbitrator or arbitrators, supra*, p. 1, 3, 6,)—*if an umpire is appointed, or to be appointed, supra*, p. 6, 15, 16.

Provided always, &c. &c. (*provision against the death of the arbitrator, or refusal to act, supra*, p. 14).

And the said do hereby, &c. (*clause for the production of evidence, and the examination of the parties, supra*, p. 1, 4, 16, and *provision against affected declaration*, p. 4).

And that the said, &c. (*to give* days' notice of meetings, *supra*, p. 2).

And further, it is agreed between, &c. (*clause directing stay of proceedings, supra*, p. 4).

And it is also agreed, &c. (*clause to empower the arbitrators to proceed ex parte, supra*, p. 16).

And if the arbitrators &c. (*clause to enable the arbitrator to have the assistance of an accountant, supra*, p. 15).

And further, that the said arbitrator, (*power to reserve points for the Court, supra*, p. 17).

And further, &c. (*power for the arbitrator to certify, supra*, p. 18, *if the action was brought to try a right*).

It is agreed, &c. &c. (*clause agreeing that a general award shall be conclusive as to the costs of the issues, supra*, p. 19).

And shall have power, &c. (*clause enabling arbitrators to direct the action to be discontinued, supra*, p. 3).

And the said parties, &c. (*clause binding parties to keep the award, supra*, p. 3, and *to enlarge the time, supra*, p. 16).

And in case one of the, &c. (*clause providing against the death of either party, supra*, p. 14).

And that all costs, &c. &c. (*clause as to the costs of the arbitrator, supra*, p. 12, 15, 18).

And that for the further, &c. &c. (*clause providing for submission being made a rule of Court, supra*, p. 1, 5, 16, 17).

And lastly, &c. &c. (*clause agreeing that one shall bring no action against the arbitrator, or against each other*).

In witness, &c.

If it should be necessary, insert a clause for the delivery of the *postea, supra*, p. 17, *power to certify, supra*, p. 18, &c. &c.

FORMS FOR APPOINTMENTS, &c. BY ARBITRATORS.

APPOINTMENT of Third Person as Arbitrator, before entering on Arbitration.

WE the within named and do by this memorandum, under our hands, made before we enter or proceed on the arbitration within-mentioned, declare that we have nominated and appointed, and do hereby nominate and appoint, of , the third person or arbitrator, to whom, together with ourselves, all matters in difference between the said parties shall be referred, according to the tenor and effect of the within rule. Witness our hands, this day of , 18 .

(Signatures.)

THE like, of an Umpire, in case of Disagreement.

WE the within named and do, by virtue and in pursuance of the powers within contained, and in us vested, hereby nominate and appoint of , to be umpire between us, in and concerning the matters in difference within referred. Witness our hands, &c. (*as in the last.*)

JUDGE'S Order to revoke Arbitrator's Authority, under Stat. 3 & 4 Wm. 4, c. 42, s. 39.

A. v. B. { Upon reading the affidavits, (&c.) and hearing the attorneys or agents on both sides, I order, that the said the plaintiff (or the defendant) in this cause, shall be at liberty to revoke and make void the power and authority of the arbitrator, (or umpire,) to make his award (or umpirage) in the reference herein. Dated the day , 18 .

(Judge's name.)

APPOINTMENT by Sole Arbitrator, for proceeding on Reference.

In the Queen's Bench, &c.

Between { A. plaintiff,
and
B. defendant.

I appoint next, at o'clock in the noon
precisely, (or, if several days are fixed, add, and the day of

following, at the same hour,) at my chambers in ,
 (or, wherever else the parties are to attend,) for proceeding on this
 reference. Dated this day of , 18 .

To Messrs. and and }
 their respective attornies. arbitrator.

THE like, of a Peremptory and Final Meeting, and of the Arbitrator's Intention to proceed Ex Parte.

I appoint , the day of instant, at
 o'clock in the noon precisely, at my chambers, &c. (as in
last,) peremptorily to proceed upon, and conclude this reference:
 and I hereby give notice, that in case of the non-attendance of
 either party, I shall nevertheless proceed, and immediately make
 my award, according to the statute in that case made and provided.
 Dated, &c. (as in *last*.)

arbitrator.

AGREEMENT by the Parties, to enlarge the Time for making Award.

WE the within named and do hereby give, grant
 and allow unto the within named arbitrators, further time for
 making their award, of and concerning the several matters within
 referred to them, until the day of next. In witness
 whereof, we have hereunto set our hands and seals, this day
 of , 18 .

Witness,

(Signatures.)

ENLARGEMENT of Time for making Award, by the Arbitrators.

WE the under-signed arbitrators, by virtue of the power given to
 us for this purpose, do hereby extend and enlarge the time for
 making our award, until the day of next ensuing;
 on or before which day, our award in writing of and concerning the
 matters in difference within mentioned and referred, shall be made
 and published. In witness whereof, &c. (as in *last*.)

Witness,

(Signatures.)

*SUMMONS to obtain such Enlargement, under Stat. 3 & 4 Wm. 4,
 c. 42, s. 39, and Judge's Order thereon.*

A. v. B. { Let the defendant's (or plaintiff's) attorney or agent
 attend me at my chambers, &c. to shew cause, why the
 time limited for the arbitrator (or arbitrators) making

AFFIDAVIT of Due Execution of Arbitration Bond.

In the Queen's Bench, &c.

of , maketh oath and saith, that he was present at the time of signing and sealing the bond or obligation hereunto annexed; and that of , therein mentioned, did duly sign, seal, and as his act and deed deliver, the said bond, in the presence of this deponent; and that the name set and subscribed to the said bond, is of the proper handwriting of the said ; and that the name set and subscribed as the witness thereto, is of the proper handwriting of this deponent.

Sworn, &c.

(Signature.)

RULE, for making it a Rule of Court.

A. v. B. { Upon reading the *affidavit* of and also the bond and condition thereof thereunder written, executed by the said ; the tenor of which said bond and condition is in the words and figures following, (that is to say:) Know all men, &c. (*to the end of the bond, and condition:*) Now, upon reading the bond and condition aforesaid, it is ordered, that the said bond, and the condition thereof, and the submission between the said parties in the said condition mentioned, be, and the same is hereby made a rule of this Court, pursuant to the statute in such case made and provided.

By the Court.

AFFIDAVIT to obtain a Rule, or Judge's Order, for compelling Witness to attend before an Arbitrator, and produce certain Documents, pursuant to 3 & 4 Wm. 4, c. 42, s. 40.

In the Queen's Bench, &c.

plaintiff, &c.

, of , attorney for the above-named plaintiff, (or defendant,) maketh oath and saith, that by a rule, (or order,) &c. (*reciting the order of submission to arbitration, if by rule of Court, order of a judge, or order of nisi prius, as in the beginning of an award, for which vide post; or, if the submission was by arbitration bonds, state that divers differences and disputes having arisen, &c.*): and that the said bonds did contain an agreement, that such submission should be made a rule of this honourable Court; (*and, if the time for making the award has been enlarged, it should be so stated:*) And this deponent further saith, that the said arbitrator having taken upon himself the burthen of the said arbitrament, hath made an appointment for a meeting upon the said reference,

on the day of next, at o'clock in the evening of that day, a copy whereof is hereunto annexed, and is signed with the proper handwriting of the said arbitrator: And this deponent further saith, that is, and will be a material and necessary witness for the said (or) touching the matters so referred as aforesaid, as he this deponent hath been informed, and verily believes: And this deponent hath also been informed, and verily believes, that the said now hath in his possession, custody, or power, an agreement in writing, (or, book, &c. *describing the document required*;) And this deponent further saith, that the said now resides at , in the county of , (stating his place of residence; or, if not known, some fact to satisfy the judge that he cannot be found:;) And this deponent further saith, that it is and will be material and necessary that the said should attend, and be examined by, and give evidence before the said arbitrator, touching the matters so referred as aforesaid, and should produce in evidence the said document to and before the said arbitrator, on the said day of next; and that the said (or) cannot safely proceed on the said arbitration, without the evidence of the said and the production and reading of the said document, to and before the said arbitrator.

Sworn, &c.

JUDGE's Order thereupon, for Attendance of Witness, with the Documents required.

A. v. B. { Upon reading the *affidavit*, (&c.) and the paper writing thereunto annexed, I do order, and command , now residing at , in the county of , (or, who at present cannot be found,) to attend before the arbitrator, to whom the matters in difference in this cause (or between the parties in this cause) stand referred, on next, at o'clock in the noon of that day, at ; and that the said do then and there submit to be duly sworn and examined upon his oath, by and before the said arbitrator, as a witness on behalf of the plaintiff, (or defendant,) touching the matters of the said reference; and do also then and there duly answer such lawful questions as shall then and there be put to him, as such witness: And I do further order, and command the said , at the time and place aforesaid, to take with him, and produce and give in evidence to and before the said arbitrator, a certain agreement in writing, (or book, &c. *describing the document required*;) in pursuance of the statute in that case made and provided; and that the said fail not in the premises, upon pain of his being deemed to have been guilty of a contempt of the said court. Dated, &c.

(Judge's name.)

JURAT of Witnesses sworn in Court, or before a Judge, to be examined before Arbitrators.

IN THE QUEEN'S BENCH, &c.

plaintiff, &c.

of
of , (&c.)

On the day of , 18 , the above witnesses were severally sworn in Court, (*or, before me, at my chambers in Rolls' Garden,*) to give evidence before the arbitrators, (*or umpire,*) to whom this cause stands referred.

(*Signatures.*) By the Court: (*or, if sworn before a judge, the judge's name.*)

OATH to be administered by Arbitrator to a Witness, pursuant to stat. 3 & 4 Wm. 4, c. 42, s. 41.

You shall true answer make, to all such questions as shall be asked of you, by or before me, touching or relating to matters in difference referred to my award, (*or, to the award of myself and* ,) without favour or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth.
So help you God.

FORMS OF AWARDS.

THE observations contained in note(a), page 1, of the Forms, equally apply in this place. For to draw a Form to meet every phase of a case which might present itself, would only be unnecessarily swelling the bulk of the book, and by consequence adding greatly to its expense, and therefore, as in the case of the Submissions, only a few, and such as the Author deemed were necessary, Forms have been inserted, more perhaps as a guide as to the form of the matter, except in the case of the usual provisions than as intending them to be adopted verbatim; by consulting the text of the work, it will be found that the results of the various cases have been given, and which together with the Forms collected, will be sufficient for any particular use, seeing that works upon Conveyancers' Forms are to be found upon the shelves of all practising barristers, and which will, with slight variations, furnish recitals upon almost every heading of law, and serve all purposes of use.

RECITAL. *Commencement of an Award by one Arbitrator upon a simple agreement.*

WHEREAS divers differences and disputes having arisen, and been depending between A. of and B. of , they the said A. and B. in order to put a final end to the said differences and disputes, did by their agreement in writing, bearing date the day of 18 , refer the same to the award, order, and determination of me the said [arbitrator]; I the said [arbitrator], the arbitrator aforesaid, having taken upon me the charge of the said award and arbitrament; and having been attended by the said parties and their respective attornies, and having heard and considered the allegations and evidence of both the said parties and their witnesses, concerning the premises, *do* thereupon make this my award in writing concerning the same) in manner and form following, that is to say; I do award, &c. &c.

RECITAL. *Award of two Arbitrators upon an agreement between A. and B. and C., wherein C. was surety for a part of a certain sum, wherein it was agreed that the submission should be made a rule of Court, &c.*

To all whom these presents shall come, we (*set out the names and descriptions of the arbitrators,*) send greeting. Whereas by an agreement in writing, bearing date the day of 18 , made between A. of the one part, and B. and C. of the other part, the said A. and B. did submit all and all manner of actions, causes of action, suits, differences, and disputes, which were pending, and had arisen between them to the final end, arbitrament, and determination of us the said arbitrators, indifferently chosen as well on the part and behalf of the said A. as of the said B. and C., so as we the said arbitrators did make and publish our award in writing on or before the day of 18 , the day of the date of these presents; and the said parties did thereby also consent and agree that the said submission or agreement should be made a rule of her Majesty's Court of Queen's Bench at Westminster, which was accordingly done. We the said (arbitrators,) do hereby make and publish this our award in writing, in manner following; that is to say; *First*, we do find and award, that there is justly due and owing from the said B. to the said A. the sum of , of which said sum, we find that the said C. has become, or made himself liable for the payment of part of the said sum of , which we find to be a just and fair debt: *We therefore* order and award the said C. to pay the said sum of to the said A., or to his attorney lawfully authorized to receive the same, on the day of .

next ensuing the date of this our award, at _____, between the hours of _____ and _____ of the clock in the forenoon of that day: And as to the sum of _____, being the residue and remainder of the said sum of _____, (after deducting the said sum of _____ so awarded to be paid by the said C., as aforesaid,) *We* order and award the same to be paid by the said B. to the said A., or to him whom he shall duly authorize to receive the same, at the time and in manner following; that is to say: (*specify the times and proportions.*) And for the better securing the payment of the said sum of _____, so by us awarded to be due from the said B., and to be paid by him, at the time and times, and in manner aforesaid, to him the said A., *We* do hereby award, order, and direct, that within one week from the day of the date of this our award, or so soon after as the same shall be demanded, the said B. shall duly seal and execute unto him the said A., a warrant of attorney, to confess a judgment against him the said B., in her Majesty's Court of Queen's Bench at Westminster, as of this present Term, for the said sum of _____, so by us awarded as aforesaid, to be paid by the said B. to the said A., but with stay of execution, as to all the respective sums of (*the different instalments,*) (by a defeazance, to be indorsed on such warrant of attorney,) until the same shall have become payable respectively, at the several times hereinbefore appointed for the payment thereof in and by this our award, according to the true meaning hereof. AND in case the said B. should refuse, or neglect to execute the said warrant of attorney as aforesaid, *We* then order and award that the said instalments shall immediately become due and payable, and it shall be lawful for the said _____, after such refusal, to demand the whole of the said sum of _____ from the said B., and to proceed for the recovery thereof; in such manner as if we had in the first instance ordered the same to be paid all at once, and not by instalments, as before mentioned, according to the true meaning hereof. And we do hereby further award and declare that a certain agreement in writing bearing date, &c. &c., and made between the said A. of the one part, and the said B. of the other part, touching the sale by the said A. to the said B. of a certain house and lands situate, &c. &c., be rescinded, and that such house and lands are and shall continue to be the property of the said A. any agreement to the contrary notwithstanding. And we do order and direct that the said agreement be delivered up by the said A. to the said B. to be cancelled, or that a proper release be given for the same in case it should appear that the said agreement has been lost or mislaid. And we do further hereby award and declare, that a certain annuity of _____ per annum granted by the said B. to the said A. during the life of the said B. by a certain indenture, &c., shall stand established; and the said A. be entitled regularly to receive the same, according to the tenor of the said indenture. And we do further award and direct, that on payment of the before mentioned sum of _____ on

the day of next, by the said C. to the said A., the said A. shall give to the said C. a proper release and discharge for the same.

RECITAL. Award of one Arbitrator after a verdict of Ejectment in favor of the plaintiff respecting his demand of mesne profits, and the value of a Windmill, removed after verdict but before the delivery of possession to the sheriff, with power to enlarge the time for making the award.

To all, &c. Whereas A. of the parish of in the county of , and B. in the parish of in the county of , made and executed a certain agreement in writing, bearing date, &c. &c., whereby after reciting that an action of ejectment was tried at the summer assizes, 18 ; at , in the said county of , wherein *John Doe*, on the several demises of the said A., and others, was the plaintiff, and the said B. was defendant; And that upon the trial of the said action, a verdict was given for the plaintiff and judgment entered up thereupon, and possession delivered to the said A. by the sheriff of the said county of , in execution of a writ of possession; And that the said A. had called upon the said B. for the payment of six years mesne profits of the lands and tenements recovered in the said action; and also for the value of the windmill, which was, as was alleged by the said A., taken down after the verdict was given, and before the possession was delivered by the sheriff as aforesaid; And that differences had arisen and were depending between the said A. and the said B. as to the said mesne profits and windmill; And that the said parties had agreed to refer the same to the award, judgment, and determination of me the said [*arbitrator*], indifferently chosen by and between the said parties, to award, arbitrate, and determine concerning the same. So as the award of me the said [*arbitrator*], should be made and set down in writing under my hand, ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the first day of then next ensuing; or on or before such further day, to which I, the said , should think proper to enlarge the time for making my award, not exceeding the first day of then next; And whereas before the said first day of I the said did, in pursuance of the said power, enlarge the time for making this my award until the day of this present month of . Now know ye, That I the said , having taken upon myself the burthen of the said reference, and having heard and duly considered the allegations of the said parties respectively; and not having been requested to examine any witnesses on behalf of either of the said parties, do make and publish this my award in writing, of and concerning the matters to me referred, in manner following; that is to say; I do

award and adjudge that the said B. shall and do forthwith pay to the said A. the sum of : And that the same be received by the said A. in full satisfaction and discharge of and for all the said matters in difference to me referred, as aforesaid. In witness, &c.

Award of Two Arbitrators, under an Agreement to refer, by A. and B., Copartners,—that each should give the other a General Release, that the Business should be the Property of One of the said Parties, and that the Debts of the said Copartnership should be got in and divided.

WHEREAS divers differences, &c. &c. And whereas for the purpose of settling, &c. &c., so as, &c. &c., we the said arbitrators, &c. &c., do by these presents order and award that the said A. shall and do, on the day of now next, between the hours of ten and twelve in the forenoon of the same day, and at or in the dwelling-house of, &c., pay or cause to be paid, the sum of £ of lawful money of Great Britain, unto the said B., his executors or administrators, or to such person or persons as he or they, by any note or writing under his or their hand or hands, shall appoint to receive the same; such note or writing to be, previously to such payment, produced and shewn to the said A., and to be, immediately after such payment, delivered to him. And we do also award and order, that the said A. shall, at his own expense, prepare, and in due form of law execute, in the presence of two or more credible witnesses, who shall thereunto subscribe their names, as witnesses attesting the execution of the same, a release to the said B., his heirs, executors, administrators, and assigns, of all, and all manner of actions, cause of actions, differences, claims, and demands whatsoever, which he the said A., at the date and execution of the said agreement, had, or might, or could have had, against the said B. for or on account of all or any of the matters and things thereby submitted to our award and arbitration as aforesaid: And the said release being so executed, attested, and subscribed as aforesaid, he the said A. shall give and deliver, or cause to be given and delivered, the same unto the said B., his executors or administrators, on the day, and at the time and place aforesaid. And we do award, and order, that all the implements, utensils, and materials belonging to the said A. and B. as copartners in the manufactory which they now carry on at aforesaid, shall from henceforth be and become the sole property of the said A., and be held and enjoyed by him as such, exclusive of the said B. And lastly, we do award and order, that all debts, sum and sums of money, now due and owing to the said A. and B., as such copartners as aforesaid, and which are still remaining unpaid and unsatisfied, shall be got in, collected as soon as conveniently may be after the date of these presents: And, that

after deducting the costs and expenses attending the collecting and getting in the said debts, the money to arise from thence, shall, as to one moiety thereof, belong and be paid to the said A., his executors, administrators, or assigns; and the other moiety thereof to the said B., his executors, administrators, or assigns. In witness, &c.

AWARD, that a Partnership be dissolved, and that A. shall receive and pay all Debts and Demands upon the Firm, and use the Name of his late Copartner, and indemnify him for such Use, and pay him a certain Sum of Money, in respect of his Share of the said Copartnership, Property and Effects.

FIRSTLY, I do award, order, and adjudge, that the said partnership shall be deemed and taken to have ended and been determined on and from the day of 18 . Secondly, that the said A., his executors or administrators, shall and may demand, have, and receive to his or their own use, without the interference of the said B., all debts due and owing to the said copartnership, from any person whomsoever: And shall and may use the name of the said B., in any action or suit to be commenced for the recovery of any such debt or demand. Thirdly, that the said A., his executors or administrators, shall and do bear, pay, and discharge all debts, demands, and claims whatsoever, due or owing by the said copartnership, or the said B., in respect thereof: And shall and do indemnify and keep harmless the said B. from and against all such debts, demands, and claims; and from and against any loss or damage that may be incurred or sustained by the said B., by reason of his name being used in any such action or suit, so to be commenced as aforesaid, in pursuance of the authority hereby given to the said A., his executors and administrators. Fourthly, that the said B. shall and do, at any time or times, upon the request of the said A., his executors or administrators, deliver up to the said A., his executors or administrators, all and every the books, papers, and writings which may be in the power or possession of him the said B., or in the custody or possession of any other person for him the said B., in any wise relating to or concerning the business of the said copartnership. Fifthly, that the said A. shall and do, on the day of next, at the house of the said B., at aforesaid, pay unto the said B., his executors or administrators, the sum of pounds: And that the said B. shall accept and receive the same sum, in full satisfaction and discharge of all demands against the said A., until the day of the date of the said submission.

AWARD by Three Arbitrators, on a Submission of Breaches of Husbandry Covenants, that the Lessee shall pay the Lessor a certain Sum for Damage, which the Arbitrators find to have been occasioned by the Lessee's having farmed contrary to the Covenant contained in his Lease: such Sum to be accepted by the Lessor as a full Compensation: the Costs of the Reference to be paid by the Lessee: the Lessee, during the Remainder of the Term, to farm according to the Course of Husbandry mentioned in a Schedule; and the Lessee, at his own Expense, to enter into a Deed of Covenant with the Lessor, to farm accordingly.

To all to whom, &c. we . Whereas by indenture of lease, bearing date on or about the day of , 18 , and expressed to be made between A., esquire, of the one part; and B., of , in the said county of , farmer, of the other part; the said A. *did* demise and let unto the said B., his executors and administrators, A certain messuage, called, &c. (*Recite particularly the covenant as to the course of husbandry upon the lease*). And whereas the said B. did not farm or cultivate the said arable lands, part of the said farm, according to the course prescribed by the said recited covenant, the said A. having, as he the said B. alleged, agreed to dispense with the said covenant, and to permit the said B. to farm the said lands in such a course of husbandry as he now uses. And whereas the said A. denies having given the permission to depart from the said condition as to the course of husbandry to be pursued, as is alleged; also allegeth that the said B. has done, or omitted to do, divers acts, matters, and things, contrary to and in breach of the other covenants, conditions, and agreements contained in the said indenture of lease, whereby the lands so demised to him as aforesaid had sustained great damage and injury: And in consequence of such breaches, or alleged breaches, by the said B., of such covenants as aforesaid, the said A. has threatened to commence an action of ejectment against the said B. for the recovery of the possession of the said premises. And whereas, in order to prevent such action as aforesaid, the said B. proposed to the said A., and the said A. consented and agreed, that it should be referred to us, or any two of us, to settle and determine by our award, whether any, and what damage had been occasioned to the said farm and hereditaments comprised in the said lease, in consequence or by reason of the said B. having at any time or times, since the day of , (*date of lease*) farmed, or otherwise managed the same, contrary to the covenant hereinbefore particularly set forth, or by reason or in consequence of the said B., having since the time aforesaid, committed any breach or breaches in, or otherwise acted contrary to any other of the covenants, clauses, conditions, and agreements, in the said indenture

of lease contained: And also to settle and determine by our said award, what sum or sums (if any) should be paid by the said B. to the said A., as a compensation for such damages, and in what manner, and at what time and place the same should be paid: And also to direct by our said award, in what order, course, and manner the said premises should be farmed, managed, and carried on during the remainder of the said term of twenty-one years; And whether any, and what agreements, or other assurances, should be made or executed by the said A. and B., or either of them. And it was agreed that all costs, charges, and expenses of and attending, or incidental to the said arbitration and award, should be borne and paid by the said B. and A. jointly, or by either of them separately, as we, or any two of us, should by our said award direct. We the said [three arbitrators], arbitrators, as aforesaid having, &c. &c., do make our award of and concerning the premises, in manner following; that is to say, First, We do award, order, adjudge, and determine, that the said B., his executors, administrators, or assigns, shall pay to the said A. the sum of pounds of lawful money of Great Britain, as a full compensation and recompense for the damage which we find and determine to have been occasioned to the said farm and hereditaments, in consequence and by reason of the said B. having, since the day of , farmed, or otherwise managed the same, contrary to the said four years' course of husbandry; and in consequence and by reason of the breaches by the said B. of the covenants and agreements in the said lease contained. And we do further award, order, adjudge, and determine, that the said sum of pounds, shall be accepted and taken by the said A., as a full compensation and recompense for such damage accordingly. And we do also award, order, adjudge, and determine, that the costs and charges attending or incident to the said reference, arbitration, and award (which we do tax and assess at the sum of pounds in the whole), shall be paid by the said B.: And that the said sum of hundred and pounds, the amount of such damages as aforesaid, and the sum of pounds, the amount of such costs, charges, and expenses as aforesaid, shall be paid by him the said B. to the said A., in the proportions, and at the times, &c. &c. And we do also award, order, adjudge, and determine, that the said B. shall henceforth, for and during all the remainder of the said term of twenty-one years; so granted to him by the said indenture of lease as aforesaid, farm, cultivate, and manage the said lands and hereditaments, as well pasture as arable, in the manner, according to the course, and with the succession and alteration of crops particularly mentioned, expressed, and declared in the schedule for that purpose prepared and settled by us, and hereunto annexed, and which said schedule shall be taken and be considered as part of this our award. In witness

ASSESSMENT OF THE LANDS OF THE COUNTY OF MIDDLESEX.

whereof we have hereunto subscribed our hands and affixed our seals, on the day of , in the year 18 .

THE schedule to which the above written award refers.

RECITAL. *Commencement of an Award under a Rule of the Court of Queen's Bench.—Reference to Two Arbitrators, with Power to appoint an Umpire.*

To all to whom these presents shall come, We, , of, &c., send greeting. Whereas by a rule of her Majesty's Court of Queen's Bench, at Westminster, made on next after , in the year of the reign of Queen Victoria, in a cause then depending in the said Court, wherein A. was plaintiff, and B. was defendant; after reciting as therein was recited, *It was ordered*, upon hearing counsel for the plaintiff and the defendant, that all matters in difference between the said parties should be referred to the award, order, arbitrament, final end, and determination of us [*the arbitrators*], and of such third person as we should, by memorandum under our hands, to be indorsed on the said rule, before we proceeded on the said arbitration, nominate and appoint, or of any two of us; so as we the said arbitrators, or any two of us should make, &c., &c.

Commencement of an Award under an Order of Nisi Prius, whereby a Cause, and all Matters in Difference between the Parties, were referred to one Arbitrator.

To all whom, &c. WHEREAS at the sitting at *nisi prius*, holden at , in the county of Middlesex, on the day of 18 , before the Right Honourable Thomas Lord Denman, Lord Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen herself, a cause came on to be tried, wherein A. was plaintiff, and B. defendant; a certain order of *nisi prius* was then and there made; whereby *It was ordered* by the Court, by consent that the said cause, and all other matters in difference between the parties should be referred to the award, arbitrament, and determination of me [*arbitrator*]; so as I should make and publish, &c., &c.

RECITAL. *Award under an Order of Nisi Prius, at the Assizes. A Verdict was directed to be entered for the Plaintiff, subject to be altered or vacated, according to the discretion of the Arbitrator.*

To all to whom these presents shall come, I, [*arbitrator*], of the Inner Temple, barrister at law, send greeting. WHEREAS a certain action at law, depending in her Majesty's Court of Common Pleas,

wherein , was the plaintiff, and , the younger, and , were the defendants, came on to be tried at the assizes holden at , in and for the county of , on the day of in the year of the reign of her present Majesty Queen Victoria, before the (a) Justices of our said Lady the Queen, appointed to take the assizes for the said county of , according to the form of the statute in that case made and provided; *It was ordered* by the said justices, in open Court, by and with the consent of the said parties, that a verdict should be entered for the plaintiff, damages pounds, costs forty shillings; but that such verdict should be subject to the award and arbitrament of me the said , to whom it was thereby referred to settle all matters in difference between the said parties, and to order and determine what I the said arbitrator should think fit to be done by either of them, respecting the matters in dispute: Now, &c.

RECITAL of Reference by a Judge's Order, in an Award.

To all to whom these presents shall come, I, of - , in the county of , barrister at law, send greeting. WHEREAS an action was lately commenced in her Majesty's Court of Common Pleas, by A. against B.: And it was on the day of now last past, by the Right Honourable Sir Nicholas Conyngham Tindal, knight, Lord Chief Justice (b) of the said Court, upon hearing the attornies on both sides, and by their consent, *Ordered*, that all matters in difference between the parties should be referred to the award, arbitrament, and determination of me the said , pursuant to the terms and conditions of a certain agreement, executed between the parties, and set forth in the said order, and which is as follows:

AWARD by an Umpire, under an Order by the Lord Chancellor, whereby a Chancery Cause was referred to the Solicitors for the Parties, who, in case of Difference, were to choose an Umpire; that the Balance due to the Defendant was £ : and £ having been paid him by the Plaintiff, since the Order of Reference, that the Balance now is £ .

To all to whom these presents shall come, I of , barrister at law, send greeting. Whereas by a certain order, made

(a) If one of the Chief Justices be associated with a puisne Judge, the Chief Justice is styled, the Right Honourable; the puisne Judge, the Honourable, reciting after the name of each the Courts to which they respectively belong.

(b) If one of the puisne Judges, say, the Honourable Sir, &c., Knight, one of her Majesty's Justices of the said Court.

by the Lord High Chancellor of Great Britain, on the day of , in the year of the reign of her present Majesty Queen Victoria, in a certain suit then depending in the High Court of Chancery, wherein A. was the plaintiff and B. was the defendant, it was, by the consent of the said parties, *Ordered*, among other things, that all accounts should be settled between the said plaintiff and defendant, and the balance paid to the defendant immediately on such settlement, including the balance on a certain note of hand, and also the wages of the said defendant: and that the accounts between the said parties should be referred to , solicitor for the said plaintiff, and solicitor for the said defendant, who, in case of differing, were to choose a third person. And whereas the said and did differ as to the said settlement of the said accounts; and did in consequence thereof choose and appoint me the said to settle the same. And I the said , having taken upon myself the settlement of the said accounts, and having heard and duly considered the allegations, vouchers, and proofs of the said parties, have settled the said accounts: And do hereby award, adjudge, and declare the balance due from the said plaintiff to the said defendant, upon such settlement, including the balance on the said note of hand, and the said defendant's wages, to be the sum of . And it having been admitted before me, by the said solicitors of the said parties, that the sum of has been paid by the said plaintiff to the said defendant, between the date of the said order and of this my award, as part of and towards the sum of money that might be found due on such settlement; I do further declare, that the sum now remaining due, to be paid by the said plaintiff to the said defendant, as the balance of the said accounts. In witness, &c.

RECITAL. *Commencement of an Award, made under an Order of the Court of Chancery, to refer a Suit and an Action at Law, &c. &c.*

WHEREAS, by an order made by his honour the Vice-chancellor, on the day of , in the year of the reign of her Majesty Queen Victoria, A.D. 18 , in a certain cause, wherein A. B. C. D. and E. were plaintiffs; and F. and others were defendants, it was, by the consent of the said plaintiffs and the said defendant F., (among other things) ordered, that a certain injunction, granted in the said cause, should be continued until the further order of the said Court; and, by the like consent, it was ordered that all matters in difference in the said suit between the plaintiffs and the said defendant, F., as well as a certain action of ejectment for recovering possession of the said premises in the said defendant's occupation, and the claim of the said plaintiffs for mesne profits, should be referred to the award, arbitrament, and determi-

nation of me (*the arbitrator*) of the Middle Temple, esquire, barrister at law, so as I should make my award, &c. (*Set out the conditions in the submission*).

AWARD that the Mortgagor do pay the Mortgagees a certain sum, together with the costs and charges incurred by his non-redemption, and that the Mortgagees do thereupon reconvey the hereditaments mortgaged, and release all Actions, &c. &c. depending between the said parties.

WE the said arbitrators do award and direct that the said A., his heirs, executors, or administrators shall pay unto the said B., his executors, administrators, or assigns, the sum of on the day of at, &c. &c., in full of all his demands, down to the day of , being the day of the date of the said submission or agreement to refer, not only on account of all principal monies and interest due to him for or in respect of certain indentures of mortgage bearing date, &c. &c. (*set out dates and parties*) but also in satisfaction and discharge of and for all costs, charges, and expenses whatsoever that have accrued or happened to or unto him the said B., touching or concerning any such mortgages, securities, actions, or other matter, or thing whatsoever, at any time before the said day of now last past, depending between the said A. and B. And we do hereby further award, order, and declare, that on payment of the said sum of by the said A. to the said B., his executors, administrators, or assigns, on the day, and at the time and place aforesaid, he the said B. shall, at the expense of the said A., his executors, administrators, or assigns, not only seal and deliver unto the said A., his executors, administrators, or assigns, a good and effectual deed of assignment, of all those leasehold messuages, tenements, and hereditaments comprised in the said deeds, or to any other person or persons whom he may appoint, *but also* shall and do, on the day and at the time and place aforesaid, deliver, or cause to be delivered unto the said A., his executors, administrators, or assigns, all deeds, evidences, and writings whatsoever in his custody, or possession, or in the custody, power, or possession of any other person or persons for or in his behalf, which relate to or are of or concerning the said mortgaged premises, or any part or parcel thereof. And we the said (*arbitrators*) do hereby further order and award, *That* the said A., his executors, administrators, or assigns, shall be let into the quiet and peaceable possession of *all* and singular the said premises hereby awarded to be assigned by the said B. to the said A., his heirs, executors, administrators, or assigns, as aforesaid, on the day of 18 . And further, we do direct and award that the said A. shall pay to the said B. all such costs, charges, and

expenses which the said B. shall have been put to in consequence of the non-redemption of the said mortgaged premises where the said costs be accrued by any action or suit, or otherwise, and also of the costs and charges of this award which are hereby assessed at . And that he the said B. upon receiving the said sum of , together with the costs and charges of the said actions or suits and expenses to be taxed by the proper officers, and also the said sum of the expenses of this award, shall execute unto the said A., his heirs, executors, and administrators, a good and sufficient release of all actions, causes of actions, suits, and differences whatsoever, both at law or in equity, or otherwise howsoever, which he the said B. had or hath for or in respect of the said mortgaged property, or any other matter or thing whatsoever from the beginning of time to the day of the date of the said agreement of reference.

AWARD of a Matter to be done by an intended Lessee in accordance with a Plan drawn upon an Award.

Recitals.—I do award that the said A. shall, on or before the second day of March now next ensuing, at his own expense, erect and make a sufficient fence of paling, or wall, but not exceeding the height of six feet, from that corner of his garden which is marked with the letter *x* on the plan drawn on this my award, across the yard, now in the occupation of the said B., to that corner of the stable, in the occupation of the said A. which is marked with the letter *x* on the said plan, according to a line drawn in red ink on the said plan, whereby a part of the said yard will be taken off, and laid to the premises in the occupation of the said A.: And that the said A., his executors, administrators, or assigns, do maintain and repair such fence or wall during the term of the lease hereinafter mentioned, and any further term which may be granted in pursuance thereof.

AWARD that a Solicitor has a Lien upon his Client's Papers, and that on the payment of £ the said Papers be delivered up, and that the Solicitor shall accept it in full Satisfaction.

I do award and declare, that the said A. has a lien upon all deeds, papers, and writings in the custody or possession of him the said A. belonging or relating to the affairs of the said B. for the payment of the sum of £ ; and I do order and direct that the said B. shall on the day of pay the said sum of £ to the said A. his executors and administrators, or to such person or persons as he or they shall by note in writing appoint to receive the same, such note or writing to be, previously to such payment, produced and shown to the said B., and immediately after such payment to be delivered to him the said B., together with all such deeds,

books, papers, and writings which he the said A., or any other person in his behalf, hath of or belonging to the said B., or of or appertaining to the affairs of the said B., in his character of solicitor to the said B. And I do further award and order, that the said A. shall accept of, and receive from the said B. the said sum of £ , in full satisfaction of the said lien, and of all other demands whatsoever. In witness whereof, &c.

CLAUSE concerning a Right of Way, directing the Verdict entered for the Plaintiff to be vacated and entered for the Defendant, and that the Defendant had a Right of Way over the Plaintiff's Lands, &c.

I do award and direct that the verdict entered for the plaintiff in the said cause be vacated and entered for the defendant; and that the defendant, his family, servants, tenants, and all other persons whomsoever, proceeding upon the business of, or for the purposes of the said B., or his said tenants, have a right to pass over the close or parcel of land, and along the way, the right to which was the subject of the said action of trespass, in order to the full and sufficient enjoyment of the said piece or parcel of land lying beyond the said close, and of the buildings and tenements erected thereon; and that the said way is not only a footway, but also a carriage and bridle way; and to the enjoyment thereof the said B. hath a right in respect of the possession of the land and tenements assigned; and, further, I do direct and award that he, the said B., together with his tenants and servants, and all other persons proceeding upon his business, shall have free use of the same, without the let or hindrance of the said A.

AWARD, where a Cause was, by the order of Court, referred back for the Reconsideration of the Arbitrator, after he had made an Award, the Defendant going again before the Arbitrator by Consent.

AND WHEREAS, after the making and publishing of my said award, and after the time thereby limited for the payment of the money thereby awarded to be paid by the said defendant to the said plaintiff, it was, by a certain other rule of the said Court of Queen's Bench, made on the now last past, Ordered, that the defendant, upon notice of that rule to be given to him, should upon show cause why a writ of attachment should not issue against him for his contempt in not paying the sum of and , pursuant to a certain rule and allocatur therein mentioned, and to my said award. AND WHEREAS, by a certain other rule of the said Court of Queen's Bench, made on , now last past, It was ordered,

that the said rule be enlarged until the last day but two of the then

Term, the defendant thereby consenting to go before the same arbitrator, who was to reconsider the amount of the damages; so as the sum then awarded should be invested in Exchequer bills, and deposited in the Bank of England within a week then next ensuing, in the names of : and that the same should be paid out (either in the whole or such part as should be awarded), upon such award being made, to . AND WHEREAS, by a

certain other rule of the said Court of Queen's Bench, made on , now last past, *It was ordered*, that the rule made in the said cause on , should be further enlarged until the first

day of the then next Term: and that I the said arbitrator should have until to make my award: and that the costs of

the further reference and award should be in my discretion. Now, know-ye, that I, the said arbitrator, having reconsidered the amount of the damages, in pursuance of the said rule for that purpose made, and having heard and duly considered the allegations, proofs, and witnesses of the said parties relating thereto, do hereby declare, that I see no reason to alter the amount of the damages: and I do, therefore, hereby confirm my said former award. And I do order and direct the several Exchequer bills, and other securities wherein the money was invested, in pursuance of the said rule in that behalf, to be forthwith delivered over to the attornies for the said plaintiff. And I do further award, order, and direct, that the said defendant shall and do pay to Messrs. , the attornies for the said plaintiff,

on behalf and for the use of the said plaintiff, within one week next after notice in writing for that purpose given to the said defendant, or left at his usual place of abode, or at the office of his attorney, Mr. , the costs and expenses of this second reference, and

of stamping and writing this my further award; such costs and expenses to be first taxed by the proper officer of the said Court of Queen's Bench. In witness, &c.

AWARD that A. shall pay to B. £ , in satisfaction of all Demands in an Action.

I do award, adjudge, and determine, that all further proceedings in the said cause shall henceforth cease, and be no further prosecuted: and that the said A. shall and do, on the day of,

&c., between the hours , &c., well and truly pay to the said B., or his attorney, the sum of £ , of lawful money of Great Britain, in full of all demands, in the said cause; and on payment the said B. shall, if required so to do, by and at the cost of the said A., execute to the said A. a general release in writing, of all actions, causes of actions, claims, and demands, whatsoever, from the beginning of time to the day of the said order.

Award, that an Exchequer Bill, in the Purchase of which a Sum of Money belonging to B. was invested, shall be Sold, and the Produce and intermediate Interest be paid to A.

AND whereas pending the said reference, a certain exchequer bill for the sum of £ , has been purchased with the money of the said B., and deposited with , to abide the event of my award. Now I do further award, that the said exchequer bill be sold and converted into money on or before the day of , and that all money produced by such sale, and all money and benefit which may have been received and arisen upon such exchequer bill, by way of interest or otherwise, be paid to the said A., on the day and at the time and place aforesaid, as part of and in reduction of the said sums of money and costs hereinbefore directed by me to be paid by the said B. to the said A.

RECITAL of the Appointment of an Umpire, in accordance with a Power contained in the Submission.

[Recite agreement to submit to award].—So as the said award were made in writing, under the hands and seals of them the said [two arbitrators], on or before the day of then next ensuing; But if they the said [two arbitrators] should not make such their award on or before the said day of , Then that they the said parties should stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination of such person as the said arbitrators should appoint as an umpire between them, in and concerning the premises; so as the said umpire should make his award or umpirage of and concerning the premises, on or before the day of then next ensuing. And whereas the said [two arbitrators] did, by a note in writing under their hands, bearing date the day of , 18 , written under the condition annexed to the said bonds, appoint me the said [umpire], to be the umpire between them. And whereas the said [two arbitrators] did not make any award of and concerning the premises on or before the said day of . Now I the said [umpire], appointed umpire as aforesaid, having taken upon myself the charge of the said umpirage, and having deliberately and at large heard, examined, and considered the allegations, witnesses, and evidences of both the said parties concerning the premises, do thereupon make this my umpirage and final determination in writing, between the said parties, of and concerning the premises, in manner and form following; that is to say:

CLAUSE in Award reciting the Appointment of a Third Person to Enter upon the Reference with Two Arbitrators, appointed by Rule of A.

AND whereas we the said , by virtue of the authority given us by the said in part recited rule, did nominate and appoint the said , to act with us in the said reference, before we proceeded on the same.

AWARD that a Suit in Chancery shall be dismissed, and the Suit determined; the costs of the Suit and of certain Actions to be taxed by the proper Officers. The Costs of the Award distinguished from the Costs of the Reference.

AND further I do award, order, and direct, with respect to the said suit in Chancery, that the said A. shall cause his own bill therein to be dismissed, with costs to be taxed by the proper officer of the said Court of Chancery, and that all proceedings at law and in equity shall be forthwith stayed, and that the costs of the said action at law shall be taxed by the proper officers of the said Courts of Queen's Bench and Common Pleas respectively; and, &c. In witness, &c.

AWARD in an Action of Trover where two Issues were joined.

AND I do award, order, and determine, that a verdict shall be entered for the said defendant on the first issue joined between the parties, and that a verdict be entered for the plaintiffs on the second issue joined between the parties: And I do award and order that each party to bear his own costs incurred by him in and about this reference, and that the said defendant do pay my fee, and the costs and expenses of this my award. In witness, &c.

AWARD that a Person had no title to certain Property.

I DO award and determine, that the said A. hath not, nor had any right or title to the said messuage, land, or premises, or to any part thereof (or to the said household goods or furniture, or the value thereof).

CLAUSE adjudging the Plaintiff to have had a good Cause of Action.

I DO award, order, and determine, that the said A. had good cause of action against the said B., as stated in the first count of the declaration in this action so referred to me as aforesaid.

In another Form.

I do find, That the said defendant did make a promissory note, as stated in the second count of the declaration in the above-mentioned action, that is to say a promissory note, bearing date the day of 18 , for the sum of , payable to the said plaintiff, or order on demand : and that the said promissory note is due and wholly unpaid : and there is due to the said plaintiff, from the said defendant, for the principal and interest thereon the sum of .

CLAUSE directing a sum of Money to be paid as the Damages in three separate Actions between the same Parties, on a Reference by Agreement.

Do find for the plaintiff in each of the said three several actions. Do award, order, and adjudge, that the defendant shall pay to the plaintiff the sum of for his damages in the action first above-named ; and I do further award, order, and adjudge, that the said defendant shall pay to the plaintiff, the sum of for his damages in the second of the said actions, being an action of covenant. And I do further award, that the defendant shall pay to the plaintiff for his damages in the remaining action, being an action of trespass ; the said three several sums to be paid within six weeks from the date of this my award ; and that no further proceedings shall be had in any or either of the said actions.

CLAUSE directing the Payment of two several Sums of Money, to two parties on the same side, on a joint and several Submission to Arbitration.

I do award and direct, that the said B. shall, within fifteen days from the date hereof, pay unto the said C. the sum of , of lawful money of Great Britain ; and I do further award, order, and adjudge, that the said B. do and shall, within the said space of time, pay unto the said D. the sum of of like lawful money ; and I do further award, order, and direct, that the costs of this reference and award be paid, as to one moiety, by the said B. ; and, as to the other moiety thereof, by the said A. and D., in two equal shares and proportions.

CLAUSE directing the Payment of a Sum of Money, with Interest to the Executors.

I do award, order, and adjudge, that the said B. shall, within one month from the date of this my award, pay unto the said A. and C. as executors as aforesaid, the sum of with interest upon the same, at per cent., from the day of , in the year of our Lord 18 , to the time of payment of the said sum, it being my opinion that the covenant in the said recited agreement, upon which the said action was brought, is a covenant upon which the plaintiffs were entitled to sue as executors of the said T. W., and not a covenant running with the land; and I do, &c.

CLAUSE directing the Payment of a Sum of Money in Satisfaction of the Matters in dispute.

I do award, order, and adjudge, that the said B. shall and do forthwith (at) pay to the said A. the sum of ; And that the same be received by the said A., in full satisfaction and discharge of and for all the said matters in difference to me referred, as aforesaid.

AWARD of a Verdict in an Action against Executors, part to be levied de bonis propriis, the residue de bonis testatoris.

I do award, order, and determine that the said A. (*the testator*) at the time of his death was indebted to the said B. in the sum of , and that the said C. at the time of the commencement of this suit, had goods and chattels which were of the said A., at the time of his death in his hands, to be administered, to the value of , and that judgment be entered up by the said B. for his damages to that amount, to be levied of the proper goods and chattels of the said C., and for the residue of his damages to be levied of the goods and chattels which were of the said A. at the time of his death, and which shall hereafter come to the hands of the said C., as executor as aforesaid, to be administered.

CLAUSE in an Award directing a Bond of Indemnity.

AND I do also further award, order, and adjudge, that the said A. B. shall, (*if to be done on the payment of money*, "at or before the payment of the said sum of above-directed to be paid

by the said C. D. to the said A. B."), seal, execute, and deliver his bond, in the penal sum of 5000*l.*, conditioned, that he, the said A. B., shall and will, at all times, well and truly—(*Here set out the condition of the bond at length*).

RECITAL in an Award of Power to Enlarge the Time, and that the Time was Enlarged.

[*Recite agreement to abide by award*].—So as I the said , &c. should make my award in writing, under my hand, ready to be delivered to the said parties, their respective executors or administrators, or such of them as should request the same, on or before the day of then next ensuing, or within such enlarged period of time, not exceeding months, as I the said [arbitrator] should think proper to fix, by any writing under my hand; as by the said agreement, reference being thereto had, will (amongst other things) more fully appear. And whereas in pursuance of the said power, the time was three several times enlarged, as will more fully appear by the Judge's orders for that purpose obtained and endorsed upon the said submission or agreement; and by the last of the said orders the time for making this my award was enlarged unto (*day of the date of the award*). Now, &c.

RECITAL, that the Costs of the Causa were to abide the Event, and the Costs of the Reference to be in the Discretion of the Arbitrator, in a Reference ad Nisi Prius.

AND it was also ordered, by and with such consent as aforesaid, that the costs of the cause should abide the event of the said award; and that the costs of the reference should be in the discretion of me, the said arbitrator; who should direct and award, by whom, and to whom, and in what manner the same should be paid.

AWARD in pursuance of a Clause in a Submission, directing the Costs of the Cause to abide the Event, and the Costs of the Reference to be in the Discretion of the Arbitrator.

I do award, order, and direct, that the said cause shall cease, and be no further prosecuted: And that the said B., his executors or administrators, shall and do pay to the said A., his executors or administrators, or such other person as he or they shall or may lawfully authorize to receive the same, at in , the sum of £ , for and in respect of the said cause and matters in difference, on the day of , 18 . And also the sum of being one moiety of the expenses of this my award.

CLAUSE in an Award, Certificate of Arbitrator.

AND by the like consent, I do certify that the action which was by the said agreement referred, was brought to try a right besides the mere right to recover damages for the said trespass and grievance as is in the said declaration alleged, and that the said defendant had no right to pass along the said alleged way, or close, or to commit the trespasses and grievances set forth in the declaration.

RECITAL, that Costs to abide the Event of the Award.

AND it was further ordered, by and with such consent as aforesaid, that the costs of the said cause, and of the said reference, or in any manner relative thereto, should abide the event of the said award or umpirage.

AWARD of the Costs of the Reference to be paid in equal Moieties.

AND I do further award, order, and direct, that one moiety of the costs and charges of this reference and award shall be paid by the said A. B., and that the other moiety thereof shall be paid by the said C. D. In witness, &c.

AWARD that each Party shall pay his own Costs of the Reference, and a Moiety of the Costs of the Award.

AND I do award, order, and direct, that the said plaintiff and the said defendant do respectively bear and sustain the costs sustained by him, in and about this reference. And that the said plaintiff and the said defendant do each pay a moiety of the costs of this my award, to be taxed by the proper officers.

AN AWARD of Costs assessed by the Arbitrator.

I do award that the costs of the said action of ejectment, which costs I find to amount to the sum of _____, be paid by the said A. to the said B., on the _____ day of _____ next ensuing the date of this my award, at the _____, in _____; and I do further award, order, and adjudge, that one moiety of the costs of this my reference and award shall be paid by the said A., and the other moiety thereof by the said B., which said costs of this reference I do assess to amount to the sum of £ _____

CLAUSE directing the Payment of a certain Sum as the Expenses of the Award.

AND we do also award and order, that the said A. shall and do

pay unto , of , upon the delivery of this our award, the sum of pounds, for the costs of us the said arbitrators in the said reference, the drawing of our award, and the stamps used for the same.

AWARD under a Reference at Nisi Prius, wherein a Verdict was directed to be entered as the Arbitrator should think fit.

I do award and declare that the said A. had good cause of action against the said B., for divers principal sums of money bearing interest, due from him to the said A., which, with interest thereon, calculated up to the tenth day of December now next, amount to, the sum of ; and for which said sum of the said may cause a verdict to be entered in the said action, and sign judgment thereon against the said , in case the several sums of money, and costs herein by me directed to be paid by him, shall not be duly paid at the time and place hereinafter appointed for that purpose; but such verdict and judgment shall stand, and be a security only for so much of such sums and costs as shall not be duly paid, together with the further costs of entering the said verdict, and signing judgment thereon, and consequent thereto.

RECITAL of a Clause in an Award, directing a Verdict entered for the Plaintiff, to be vacated and entered for the Defendant.

I do award and determine, that at the time of commencing the said suit, the said A. had no cause of action whatever against the said B., in respect of the said matters to me referred. And I do thereupon award, order, and direct, that instead of the said verdict and damages, so found for the said A., plaintiff, a verdict in the said action be entered for the said B., defendant in the said action.

CLAUSE in an Award, directing a Verdict to stand.

I do award and direct that the verdict directed to be entered for the said plaintiff do stand and be in force.

CLAUSE directing the Verdict for the Plaintiff to stand, but reducing the Damages.

I do award, order, and adjudge, that the verdict already entered up for the plaintiff shall stand, but that the damages be reduced

to . And I do further award, order, and direct that the costs of this reference be paid as to one moiety thereof by the said plaintiff, and as to the other moiety thereof by the said defendant. In witness, &c.

AWARD of Verdict on several Issues.

I do award, order, and determine, as to the first issue joined between the parties, that the defendant is not guilty of the trespasses in the declaration in this action laid to his charge, except as herein-after mentioned; and, as to the second issue, I do find for the defendant that he did not of his own wrong, but for such cause as the defendant hath in his plea alleged, assault, beat, bruise, wound, and ill treat the said plaintiff, as he the said plaintiff has stated: and as to the last issue joined between the parties, I do award, determine, and find that the defendant is guilty of the trespasses newly assigned; and I do assess the damages of the said plaintiff on account of the trespasses newly assigned, over and above his costs and charges, to one shilling.

RELEASE by a Mortgagee to a Mortgagor, of all Actions and Demands pursuant to the Direction of an Award; excepting a Warrant of Attorney, directed by the Award to be given by the Mortgagor to the Mortgagee.

Know all men by these presents, that I, , of , in the county of , have remised, released, and for ever quitted claim; and by these presents do remise, release, and for ever quit claim unto , of , in the said county, gentleman, his heirs, executors, and administrators, all actions, causes of action, judgments, suits, controversies, damages, and demands, whatsoever, for or by reason of any matter, cause, or thing, whatsoever, from the beginning of the world to the day of last; save and except a certain warrant of attorney, directed to be executed to me by the said A., in and by a certain award, made this day of , 18 , by , esquire of, &c., barrister at law, on a reference to him of all disputes between me and the said .

In witness whereof I have hereunto set my hand and seal, the day of , in the year of our Lord, 18 .

SIGNED, SEALED, AND DELIVERED, }
(being first duly stamped in)
the presence of)

RELEASE by a Mortgagor to a Mortgagee, of all Actions and Demands, pursuant to the Direction of an Award; excepting his Right to Redeem, in the manner prescribed by the Award.

KNOW all men by these presents, that I, A., of in the county of , gentleman, have remised, released, and for ever quitted claim; and by these presents do remise, release, and for ever quit claim, unto B., of , in the said county, his heirs, executors, and administrators, all actions, causes of action, judgments, suits, controversies, damages, and demands, whatsoever, for or by reason of any matter, cause, or thing, whatsoever, from the beginning of the world to the day of last; save and except my right to redeem a certain farm, now in mortgage to the said , at the time, under the terms, and in the manner prescribed in and by a certain award, made the day of , in the year , by , esquire, of, &c. barrister at law, on a reference to him of all disputes between me and the said . In witness, &c.

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